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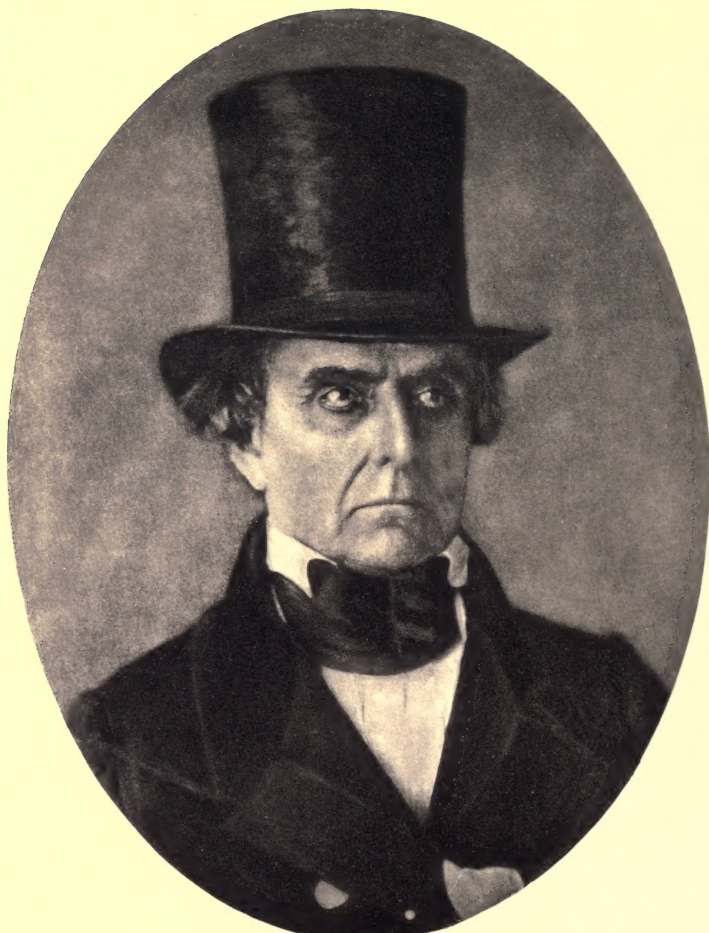
BEQUEST
OF
LOUISIANA SCOTT SHUMAN

THE
WRITINGS AND SPEECHES
OF
DANIEL WEBSTER

National Edition

VOLUME FIFTEEN

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THE WRITINGS AND
SPEECHES
OF
DANIEL WEBSTER

IN EIGHTEEN VOLUMES



VOLUME FIFTEEN

The Writings and Speeches of
DANIEL WEBSTER
HITHERTO UNCOLLECTED
VOLUME THREE · MIS-
CELLANEOUS PAPERS
LEGAL ARGUMENTS
EARLY ADDRESSES, ETC.
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Miscellaneous Papers

VOL. III. — I

Extraordinary Red Book

NORTH AMERICAN REVIEW, December, 1816.

"Extraordinary Red Book; a List of all places, pensions, sinecures, &c. &c. with the salaries and emoluments arising therefrom. Exhibiting also a complete view of the National Debt, &c. &c. the whole comprising the strongest body of evidence to prove the necessity of retrenchment, &c. London, 1816."

THE foregoing is the title of a book recently published in England, for the purpose of showing the necessity of further and greater retrenchments in the expenses of government, and probably not without some design of spreading the opinion that a change of ministers would be the measure most likely to produce the desired effect. It is evidently the work of some of the members or adherents of the opposition, and some of its statements rest on the authority of the newspapers. But the great mass of its detail is professedly collected from authentic sources, and the account, in general, is probably accurate.

The English Government, in all its parts, seems to be a singular result of the combined effects of time, accident, and opportunity improved. The operation of these causes is seen, not only in the general organization of government, and in that adjustment and balance of its great powers which may be said to form the Constitution of England, but also in the exterior structure, and, if we may so say, the domestic arrangement of the system. Thus there are not only members in the House of Commons who are representatives without constituents, but there are also in the subordinate branches of government, and throughout all the orders of the state, offices in which the incumbents receive pay, although they long ago ceased to have duties. These sinecures, inasmuch as they add something to the taxes on the people, without producing any corresponding advantage to the state, are certainly evils in the government, and one would think ought to be, and might be made to submit

to a system of temperate and gradual abolition. It is easy, however, to see that even the best disposed minister would find difficulties in this work. Many of these offices have, in the course of time, by grant of the crown or other mode of acquisition, become private property. Private property in a free government cannot always be sacrificed, even to public economy. A despotic government, no doubt, could accomplish this desired simplification, and strike off, at once, everything which detracted from the beautiful and perfect theory of the state. Bonaparte, for instance, would never have suffered his plan or system of administration to be deformed by any uncouth, antiquated, and useless appendages, merely because they had become connected with private rights, and the interest of individuals. Nothing is simpler in the mode of its existence than despotic power. It is *teres et rotundus*. It is exactly regular and cubic in its proportions. Old Sarum would have had no chance to interpose her representative among the members of Napoleon's legislative body. She might have exhibited her old parchment charters, and asserted an immemorial prescription in her favor, but she would have done all in vain. She would have been disfranchised because she had but three electors; and it being thus determined that the right is not derived from grant or prescription, but belongs to numbers, and the numbers being undefined (for what does despotism establish that it cannot alter?) the next city would be alike disfranchised because it had but three hundred electors, and the next because it had but three thousand. In such cases, the question is, therefore, whether the evil shall be borne, for the sake of preserving the system, or whether, in order to get rid of the evil, the system itself shall be changed. We make these remarks, not as particularly applicable to the subject of parliamentary reform in England, but as indicating an important general political truth. The great object of good government is to insure permanent privileges, and a lasting security for rights. But such is human nature that even from this first of all good principles, permanent evils sometimes result. Judges ought, for example, to have a permanent tenure in their office. This is necessary to secure their uprightness and impartiality. Yet this provision will sometimes seat an incompetent judge permanently on the

bench. But it would be folly, on that account, to refuse a permanent tenure to the judicial office. No system of human contrivances produces unmixed good. It can never be wise, therefore, to tear away a long endured evil without considering whether some principle of good, springing from the same root, and watered from the same spring, will not be destroyed together with the evil which the imperfection of human institutions has connected with it.

Happily, in this country, we are not frequently called on to act in cases requiring the application of these considerations. We are not yet oppressed with pensions and sinecures. In the present age of our government, our business seems rather to be to guard against the introduction of new, than to prune away old abuses. It is not likely that an extravagant allowance for the civil list will very soon be among our grievances. The current of things is the other way; and there is perhaps danger that an inadequate provision for those who administer the concerns of the public, will bring about that unnatural and unlovely state of things, when little or nothing of the talent of the country shall be employed in its government.

The amount of expenditures of the civil list of Great Britain for the year ending January 5, 1816, is stated in the book before us to be £1,480,231 14s. 6½d. These expenditures are divided into classes, arranged, we believe, nearly or quite upon the plan of Mr. Burke's bills for economical reform, viz.:

		s.	d.
1. The Royal Family	£334,500	0	0
2. The Judges	32,955	0	0
3. Ministers at Foreign Courts	169,429	2	9
4. Bills in Lord Chamberlain's, Lord Steward's, Master of Horse and Master of Robes' Department	267,779	14	6
5. Salaries in same Departments as foregoing	119,397	14	11¾
6. Pensions and Compensations	155,713	5	11
7. Small Fees and Salaries	45,950	13	3
8. Salaries of Commissioners of Treasury, and Chancellor of the Exchequer	13,822	0	0
Occasional Payments (embracing a great variety of items and objects)	340,684	3	1¾
	£1,480,231	14	6½

The total of the civil list, as stated above, is probably about one thirty-fifth, or one fortieth of the whole expenditure of the

government. It is obvious, therefore, that if all practical deductions were made, or even the whole abolished, the effect would not be very great on the necessary amount of taxes. The magnitude of the national debt, and the army and navy supplies, are the great causes of the necessity of heavy taxation.

The most odious of the sinecures of which an account is given in this book are those connected with the courts of justice. It is no small blemish on the English system of judicial administration that the course of legal redress for injuries is rendered expensive by the fees and emoluments which are demanded for the incumbents of useless places. Thus the registership of the admiralty, an office executed, we presume, altogether by deputy, is stated to yield to the present incumbent, Lord Arden, an income of ten thousand pounds,* after paying all deputies, substitutes, etc. In other words, the office is a sinecure to that amount. Instances of a similar nature exist in some of the other courts. The Secretary of War, Lord Bathurst, is clerk of the Crown in Chancery, and the same office is already granted in reversion to the Hon. Mr. Scott. This old practice of granting offices in reversion must be a most powerful enemy to all just reform and retrenchments; because it leaves no time when the government might abolish or reform the office without affecting the vested rights of the individual.

The true principles of reform, such alone as are practicable and efficient, and at the same time just and consistent with private rights and private property, are delineated in Mr. Burke's speech on economical reform, one of the most valuable of the political works of that incomparable man.

Among the most liberal allowances of the British government are those made to its foreign ministers. The following are instances :

Earl of Aberdeen,	Ambassador at Vienna,	per annum, £13,000
Lord Cathcart,	do. St. Petersburg,	do. 13,000
Sir Henry Wellesley,	do. Madrid,	do. 10,603
Hon. C. Bagot,	do. U. States,	do. 6,500
Lord William Bentinck,	do. Two Sicilies,	do. 6,500
Lord Burghersh,	do. Tuscany,	do. 4,300
Mr. Thornton,	do. Sweden,	do. 5,300

* The whole amount of sinecures held by Lord Arden is upwards of 33,000 pounds per annum.

The other leading nations of Europe make compensation to their ministers abroad not very different, it is believed, in amount from the foregoing rates. The United States has hitherto pursued a much more economical system. Our ministers at the principal courts of Europe are allowed nine thousand dollars a year, and can be allowed no more. An attempt to raise this sum failed, last winter, in the House of Representatives, although the members had just voted to increase their own compensation. It deserves consideration, whether those who are intrusted to represent the sovereignty, and uphold the dignity of this nation abroad, ought to be placed in a condition which must subject them to perpetual mortification.

On the whole, one shuts up this book as he closes any other examination into the state of the best governed, the freest, and the happiest nation in Europe, with a reflection on the still greater means of happiness and prosperity enjoyed by the people of this country. We have had it in our power to cull the best principles of the English constitution to form our own. The Government is yet too young to feel the infirmities of age. Few sinecures or useless offices are as yet in existence. No place of profit is granted in reversion. Taxes are yet comparatively light; and the most rapidly increasing population which the world has witnessed, when it shall have spread and thickened from the Atlantic to the Mississippi and Missouri, may yet look to the west, and still see "the world all before it," over which to pour forth its still augmenting numbers. But a deep anxiety accompanies the vision of this goodly prospect. Our institutions are still human, and having many peculiar excellences, they have, it is to be feared, peculiar defects. If they lay open the road of honor and preferment equally to all the good, the bad will rush in at the same entrance, when virtue and patriotism, which ought to guard the avenue, are driven away by interest or by party. In a free press is the unrelenting scourge of vice; a licentious press makes havoc of all virtue, and confounds, in the public eye, all distinction between the evil and the good. If universal suffrage, in its wise and sober use, secures rational liberty, in its abuse it creates factions and party, and these, in their

excess, destroy all power of free thinking or free acting, and, in truth, leave the people no right of suffrage at all. In times of high party feeling there is no such thing as free and conscientious choice of rulers. Prerogative never shielded its favorites and its creatures from all censure and all scrutiny so completely as party has done it. The theoretical doctrine of the English constitution, that the king can do no wrong, is not more true than the practical doctrine of republics, in times of contention, that the head of a party can do no wrong.

Let it be considered, too, that although some good men may be willing to take office, for the sake of the public, there will be many struggling for it, from motives of gain and selfishness. The first will be most competent, but the last most assiduous. The first will labor to prepare themselves for office; the others will labor to prepare office for themselves. And while the frequency and the tumult of elections discourage public spirit, and wear out patriotism, they will in no degree abate the eagerness of self-interest, or mitigate the fury of party.

These, then, are the evils which threaten the duration of our Government, and against which all the well-meaning and all the wise should unite their efforts: the assiduity and impudence of office-seekers; the licentiousness of the Press; the abuse and perversion of the right of suffrage; and, above all, that violence of party spirit, which has shown itself in the hands of demagogues the most tremendous engine of mischief ever wielded against the liberties of a free people.



Engraved by H. Wright Smith from a Photograph by Southworth & Hawes

Peroration to the Dartmouth College Argument

WASHINGTON, March 10, 1818.

RUFUS CHOATE in his Eulogy on Webster delivered at Dartmouth July 27, 1853, said that he well remembered "how it was written home from Washington, that 'Mr. Webster closed a legal argument of great power by a peroration which charmed and melted his audience.' I was aware," he continued, "that the report of his argument as it was published, did not contain the actual peroration, and I supposed it lost forever. By the great kindness of a learned and excellent person, Dr. Chauncy A. Goodrich, a professor in Yale College, with whom I had not the honor of acquaintance, although his virtues, accomplishments, and most useful life were well known to me, I can read to you the words whose power, when those lips spoke them, so many owned, although they could not repeat them. As those lips spoke them, we shall hear them nevermore, but no utterance can extinguish their simple, sweet, and perfect beauty. Let me first bring the general scene before you, and then you will hear the rest in Mr. Goodrich's description. It was in 1818, in the thirty-seventh year of Mr. Webster's age. It was addressed to a tribunal presided over by Marshall, assisted by Washington, Livingston, Johnson, Story, Todd, and Duvall, — a tribunal unsurpassed on earth in all that gives illustration to a bench of law, and sustained and venerated by a noble bar. He had called to his aid the ripe and beautiful culture of Hopkinson; and of his opponents was William Wirt, then and ever of the leaders of the bar, who, with faculties and accomplishments fitting him to adorn and guide public life, abounding in deep professional learning, and in the most various and elegant acquisitions, — a ripe and splendid orator, made so by genius and the most assiduous culture, — consecrated all to the service of the law. It was before that tribunal, and in presence of an audience select and

critical, among whom, it is to be borne in mind, were some graduates of the college, who were attending to assist against her, that he opened the cause. I gladly proceed in the words of Mr. Goodrich."

"Before going to Washington, which I did chiefly for the sake of hearing Mr. Webster, I was told that, in arguing the case at Exeter, New Hampshire, he had left the whole courtroom in tears at the conclusion of his speech. This, I confess, struck me unpleasantly, — any attempt at pathos on a purely legal question like this seemed hardly in good taste. On my way to Washington I made the acquaintance of Mr. Webster. We were together for several days in Philadelphia, at the house of a common friend; and as the college question was one of deep interest to literary men, we conversed often and largely on the subject. As he dwelt upon the leading points of the case, in terms so calm, simple, and precise, I said to myself more than once, in reference to the story I had heard, 'Whatever may have seemed appropriate in defending the college at home, and on her own ground, there will be no appeal to the feelings of Judge Marshall and his associates at Washington.' The Supreme Court of the United States held its session, that winter, in a mean apartment of moderate size, — the Capitol not having been built after its destruction in 1814. The audience, when the case came on, was therefore small, consisting chiefly of legal men, the *élite* of the profession throughout the country. Mr. Webster entered upon his argument in the calm tone of easy and dignified conversation. His matter was so completely at his command that he scarcely looked at his brief, but went on for more than four hours with a statement so luminous, and a chain of reasoning so easy to be understood, and yet approaching so nearly to absolute demonstration, that he seemed to carry with him every man of his audience without the slightest effort or weariness on either side. It was hardly *eloquence*, in the strict sense of the term; it was pure reason. Now and then, for a sentence or two, his eye flashed and his voice swelled into a bolder note, as he uttered some emphatic thought; but he instantly fell back into the tone of earnest conversation, which ran throughout the

Dartmouth Argument Peroration 11

great body of his speech. A single circumstance will show you the clearness and absorbing power of his argument.

“I observed that Judge Story, at the opening of the case, had prepared himself, pen in hand, as if to take copious minutes. Hour after hour I saw him fixed in the same attitude, but, so far as I could perceive, with not a note on his paper. The argument closed, and *I could not discover that he had taken a single note*. Others around me remarked the same thing; and it was among the *on dits* of Washington, that a friend spoke to him of the fact with surprise, when the judge remarked, ‘Everything was so clear, and so easy to remember, that not a note seemed necessary, and, in fact, I thought little or nothing about my notes.’

“The argument ended. Mr. Webster stood for some moments silent before the Court, while every eye was fixed intently upon him. At length, addressing the Chief Justice, Marshall, he proceeded thus:—

“*This, sir, is my case!* It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country,—of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life. It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped; for the question is simply this: Shall our State Legislatures be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit!

“‘Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work! You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land!

“‘It is, sir, as I have said, a small college. And yet *there are those who love it*—’

“Here the feelings which he had thus far succeeded in keep-

ing down broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears, his voice choked, and he seemed struggling to the utmost simply to gain that mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you the few broken words of tenderness in which he went on to speak of his attachment to the college. The whole seemed to be mingled throughout with the recollections of father, mother, brother, and all the trials and privations through which he had made his way into life. Every one saw that it was wholly unpremeditated, a pressure on his heart, which sought relief in words and tears.

“The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side, — with his small and emaciated frame, and countenance more like marble than I ever saw on any other human being, leaning forward with an eager, troubled look; and the remainder of the court, at the two extremities, pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look, and every movement of the speaker’s face. If a painter could give us the scene on canvas, — those forms and countenances, and Daniel Webster as he then stood in the midst, it would be one of the most touching pictures in the history of eloquence. One thing it taught me, that the *pathetic* depends not merely on the words uttered, but still more on the estimate we put upon him who utters them. There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument, melted into the tenderness of a child.

“Mr. Webster had now recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the heart of an audience, —

“ ‘Sir, I know not how others may feel’ (glancing at the opponents of the college before him), ‘but, for myself, when I

Dartmouth Argument Peroration 13

see my Alma Mater surrounded, like Cæsar in the senate-house, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me, and say, *Et tu quoque, mi filii!* And thou too, my son!’

“He sat down. There was a deathlike stillness throughout the room for some moments; every one seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling.”

The Battle of Bunker Hill General Putnam

NORTH AMERICAN REVIEW, July, 1818.

1. *An account of the Battle of Bunker Hill. By H. Dearborn, Major-General of the United States Army. 1818.*
2. *A letter to Major-General Dearborn, repelling his unprovoked attack on the character of the late Major-General Israel Putnam. By Daniel Putnam, Esquire. 1818.*

WERE it not for the extremely unpleasant nature of the discussion to which the first of these pamphlets has given rise, we should not regret the occasion of recurring to that distinguished and ever memorable opening of the Revolutionary contest. No national drama was ever developed in a more interesting and splendid first scene. The incidents and the result of the battle itself were most important, and indeed most wonderful. As a mere battle, few surpass it in whatever engages and interests the attention. It was fought on a conspicuous eminence in the immediate neighborhood of a populous city, and consequently in the view of thousands of spectators. The attacking army moved over a sheet of water to the assault. The operations and movements were, of course, all visible and all distinct. Those who looked on from the houses and heights of Boston had a fuller view of every important operation and event, than can ordinarily be had of any battle, or than can possibly be had of such as are fought on a more extended ground, or by detachments of troops acting in different places, and at different times, and in some measure independently of each other. When the British columns were advancing to the attack, the flames of Charlestown (fired, as is generally supposed, by a shell) began to ascend. The spectators, far out-

numbering both armies, thronged and crowded on every height and every point which afforded a view of the scene, themselves constituted a very important part of it.

The troops of the two armies seemed like so many combatants in an amphitheatre. The manner in which they should acquit themselves was to be judged of, not, as in other cases of military engagements, by reports and future history, but by a vast and anxious assembly already on the spot, and waiting with unspeakable concern and emotion the progress of the day.

In other battles the recollection of wives and children has been used as an excitement to animate the warrior's breast and nerve his arm. Here was not a mere recollection, but an actual presence of them and other dear connections, hanging on the skirts of the battle, anxious and agitated, feeling almost as if wounded themselves by every blow of the enemy, and putting forth, as it were, their own strength and all the energy of their own throbbing bosoms into every gallant effort of their warring friends.

But there was a more comprehensive and vastly more important view of that day's contest than has been mentioned, — a view, indeed, which ordinary eyes, bent intently on what was immediately before them, did not embrace, but which was perceived in its full extent and expansion by minds of a higher order. Those men who were at the head of the colonial councils, who had been engaged for years in the previous stages of the quarrel with England, and who had been accustomed to look forward to the future, were well apprised of the magnitude of the events likely to hang on the business of that day. They saw in it not only a battle, but the beginning of a civil war of unmeasured extent and uncertain issue. All America and all England were likely to be deeply concerned in the consequences. The individuals themselves, who knew full well what agency they had had in bringing affairs to this crisis, had need of all their courage, — not that disregard of personal safety, in which the vulgar suppose true courage to consist, but that high and fixed moral sentiment, that steady and decided purpose, which enables men to pursue a distant end, with a full view of the difficulties and dangers before them, and with a conviction, that, before they arrive at the proposed end, should

they ever reach it, they must pass through evil report as well as good report, and be liable to obloquy, as well as to defeat.

Spirits that fear nothing else fear disgrace ; and this danger is necessarily encountered by those who engage in civil war. Unsuccessful resistance is not only ruin to its authors, but is esteemed, and necessarily so, by the laws of all countries, treasonable. This is the case, at least till resistance becomes so general and formidable as to assume the form of regular war. But who can tell, when resistance commences, whether it will attain even to that degree of success ? Some of those persons who signed the Declaration of Independence in 1776 described themselves as signing it, “as with halters about their necks.” If there were grounds for this remark in 1776, when the cause had become so much more general, how much greater was the hazard when the battle of Bunker Hill was fought ? Otis, to whose merits it is high time that some competent pen should do full and ample justice, had ceased to be active in public concerns ; but others who had partaken of the public councils with him, — and among them, he who acted a conspicuous part in the business of those times, and who yet lives, to assert, with a vigor unimpaired by years, the claims of the patriots of this Commonwealth to a full participation and an efficient agency, not only in the very earliest scenes of the Revolution, but in the events which preceded it, and in which it may be said, more than in any other particular occurrences, to have had its origin, — were earnestly watching the immediate issue of the contest, but well seeing also, at the same time, its more remote consequences, and the vastness and importance of the scene which was then opening.

These considerations constituted, to enlarged and liberal minds, the moral sublimity of the occasion ; while to the outward senses the movement of armies, the roar of artillery, the brilliancy of the reflection of a summer’s sun from the burnished armor of the British columns, and the flames of a burning town, made up a scene of extraordinary grandeur. But we must recall ourselves from these reflections to the publications before us.

The first of these is by General Dearborn, lately a Major-General in the service of the United States, and, as he informs

us, a captain in Stark's regiment, in the Battle of Bunker Hill.

The "Account" contains several things worth knowing, relative to the incidents of the battle, and would not have been an unacceptable present to the public but for the charges it contains against General Putnam, which we shall hereafter endeavor to state. The following paragraph does justice, and we believe no more than justice, to the coolness and steadiness of Stark, and the good conduct of the men under his command: "After completing the necessary preparations for action, Colonel Stark's regiment formed and marched about one o'clock. When it reached Charlestown Neck, we found two regiments, halted, in consequence of a heavy enfilading fire thrown across it, of round, bar, and chain shot, from the Lively Frigate, and floating batteries anchored in Charles River, and a floating battery lying in the river Mystic. Major M'Clary went forward, and observed to the commanders, if they did not intend to move on, he wished them to open and let our regiment pass; the latter was immediately done. My company being in front, I marched by the side of Colonel Stark, who, moving with a very deliberate pace, I suggested the propriety of quickening the march of the regiment, that it might sooner be relieved from the galling cross fire of the enemy. With a look peculiar to himself, he fixed his eyes upon me, and observed with great composure, 'Dearborn, one fresh man in action is worth ten fatigued ones,' and continued to advance in the same cool and collected manner."

In the following paragraph is described, we think, the general habits of the New England militia during the Revolutionary War, whenever they were engaged in battle, and were tolerably well sheltered from the enemy's fire: "Our men were intent on cutting down every officer whom they could distinguish in the British line. When any of them discovered one, he would instantly exclaim, 'There,' 'See that officer,' 'Let us have a shot at him,' when two or three would fire at the same moment; and as our soldiers were excellent marksmen and rested their muskets over the fence, they were sure of their object. An officer was discovered to mount near the position of General Howe, on the left of the British line, and ride towards our left, which a column was endeavoring to turn. This was the

only officer on horseback during the day, and as he approached the rail fence, I heard a number of our men observe, 'There, there,' — 'See that officer on horseback' — 'Let us fire' — 'No, not yet' — 'Wait until he gets to that little knoll' — 'Now,' when they fired, and he instantly fell dead from his horse. It proved to be Major Pitcairn, a distinguished officer. The fire of the enemy was not badly directed, I should presume that forty-nine balls out of fifty passed from one to six feet over our head, for I noticed an apple-tree, some paces in the rear, which had scarcely a ball in it from the ground as high as a man's head, while the trunk and branches above were literally cut to pieces."

But this publication has attracted public attention principally from an accusation which it brings forward against the conduct of General Putnam, on the day of the battle, and from the opinions it expresses of the general character and merits of that officer. "When the troops," on their retreat, "arrived at the summit of Bunker Hill, we found General Putnam with nearly as many men as had been engaged in the battle; notwithstanding which no measure had been taken for reinforcing us, nor was there a shot fired to cover our retreat, or any movement made to check the advance of the enemy to this height; but, on the contrary, General Putnam rode off, with a number of spades and pick-axes in his hands, and the troops that had remained with him inactive during the whole of the action, although within a few hundred yards of the battleground and no obstacle to impede their movements but musket balls." And again, "General Putnam had entered our army at the commencement of the Revolutionary War, with such an universal popularity as can scarcely now be conceived, even by those who then felt the whole force of it, and no one can at this time offer any satisfactory reasons why he was held in such high estimation.

"In the battle of Bunker Hill he took post on the declivity towards Charlestown Neck, where I saw him on horseback, as we passed on to Breed's Hill, with Colonel Gerrish by his side. I heard the gallant Colonel Prescott (who commanded in the redoubt) observe, after the war, at the table of His Excellency James Bowdoin, then Governor of this Commonwealth, 'that

he sent three messengers during the battle to General Putnam, requesting him to come forward and take the command, there being no general officer present, and the relative rank of the colonel not having been settled; but that he received no answer, and his whole conduct was such, both during the action and the retreat, that he ought to have been shot.' He remained at or near the top of Bunker Hill until the retreat, with Colonel Gerrish by his side; I saw them together when we retreated. He not only continued at that distance himself during the whole of the action, but had a force with him nearly as large as that engaged. No reinforcement of men or ammunition was sent to our assistance; and, instead of attempting to cover the retreat of those who had expended their last shot in the face of the enemy, he retreated in company with Colonel Gerrish and his whole force, without discharging a single musket; but what is still more astonishing, Colonel Gerrish was arrested for cowardice, tried, cashiered, and universally execrated; while not a word was said against the conduct of General Putnam, whose extraordinary popularity alone saved him, not only from trial, but even from censure. Colonel Gerrish commanded a regiment, and should have been at its head. His regiment was not in action, although ordered, but as he was in the suite of the general, and appeared to be in the situation of an adjutant-general, why was he not directed by Putnam to join it, or the regiment sent into action under the senior officer present with it?

"When General Putnam's ephemeral and unaccountable popularity subsided or faded away, and the minds of the people were released from the shackles of a delusive trance, the circumstances relating to Bunker Hill were viewed and talked of in a very different light, and the selection of the unfortunate Colonel Gerrish as a scapegoat considered as a mysterious and inexplicable event.

"I have no private feelings to gratify by making this statement in relation to General Putnam, as I never had any intercourse with him, and was only in the army where he was present for a few months; but at this late period I conceive it a duty to give a fair and impartial account of one of the most important battles during the war of independence, and all the

circumstances connected with it, so far as I had the means of being correctly informed."

The matter of these charges, it must be confessed, is weighty and important; and it is quite unaccountable to us, that any man should choose to bring them forward, and rest the proof of them solely upon his own declaration. General Putnam has been dead many years. His biographer, General Humphreys, died a few months before the appearance of this publication. It could not, however, but be supposed, that there were friends and connections of General Putnam still living, whom this "Account" would sting to the heart. If well made out in proof, this charge must cover the character of their deceased relative with disgrace, and themselves with mortification. If not made out, they could not but be expected to feel some indignation towards the author of the "Account," unless they are all as spiritless as the "Account" would represent the General himself.

It should have occurred to the author of the "Account," that, by making this publication voluntarily and without necessity, he has deprived himself of the full advantage of his own testimony. However far above all suspicion his own character for personal veracity may be in other instances, in this the community can hardly view him in any other light than that of an accuser. He is the prosecutor against the fame and character of General Putnam; and this, too, after a lapse of more than forty years, when we should have supposed that the immunities of the grave would have been a safeguard and protection to the character and fame of the dead. He has adduced charges, both general and particular, of high import, which no other man has ever undertaken to establish before the community.

Every descendant and connection of General Putnam is bound to protect and preserve his character and fame from unmerited reproach. He has a right, it is his duty, to call upon the prosecutor to produce evidence in support of the charges, or to retract them.

There is a solemn duty, also, resting on the community. The country itself owes a debt of gratitude to those worthies who established her independence, and can repay it only by holding

their characters and fame in sacred trust. She is bound to defend and protect this trust against all posthumous enemies. She should not suffer this treasure, thus committed to her care, to be subject to spoliation or diminution. She has once decided upon their merits ; she is now bound to see that her decisions are respected, until upon a thorough investigation of the charges preferred, and the evidence adduced in support of them, she shall see fit to reverse her decrees.

The public has not only this solemn duty to perform, but has also a deep interest in relation to this subject. It has an interest in the reputation of its distinguished men, which, when it ceases to preserve or protect, it will cease to deserve distinguished services from any of its citizens. The characters of its great men are the real treasures of the country. They are the regalia of the Republic. What has it but these for its glory ? What, but these, for the themes of its poets and orators ? What, but these, for the examples of its emulous youth ? When possessions of this nature shall be little esteemed, it will evince a strange disregard to the highest subjects of national interest.

Nearly half a century has elapsed from the commencement of the Revolution, and in this flight of years, a great majority of those who acted prominent parts in it have been carried to the tomb. A small number survive, yet enjoying the fruit of their services, and rejoicing in the prosperity of their country. We cannot conceive what motives should induce any one of those who are still living to venture rashly in an attack on the fame of the dead. How long can he who is the youngest of the survivors expect to live to vindicate his own claims to his country's gratitude ? And which of them can expect that those who come after him and are of another generation shall pay a more tender and sacred regard to his fame, than he may have been found to manifest to the fame of one of his own associates and companions in arms ? The last man who should bring forward, at this day, an accusation against one who has long been dead, and who died in the full possession of his country's regard and gratitude for his services in our Revolution, is he who has himself claims on that regard and gratitude for similar services. Even the common feelings of self-interest would seem sufficient

to repress such an undertaking by such a hand. What is the value of Revolutionary merit, if, forty years after the actions on which it rests were performed, and twenty years after he who performed them has gone to his grave, this merit may be denied in terms of bold and unqualified assertion, and the country informed that imbecility, cowardice, want of patriotism, and neglect of duty, were the true characteristics of those to whom it has uniformly ascribed a generous devotion to the public interest, inflexible virtue, and undaunted courage? And especially what is to be the value of this merit, if such attacks are to be made upon it, not by the temerity of the striplings of the rising generation, but by one who was an associate and fellow laborer? There are occasions, it is true, in which great sacrifices must be made to the truth of history, and to a desire of disabusing mankind of their prejudices and false opinions. But such necessity, we have flattered ourselves, has not existed in relation to the public men of the United States. We cannot persuade ourselves that it existed in the case of General Putnam, and we cannot therefore but feel the deepest regret for the occasion which has produced these remarks.

But we must examine the charges preferred by General Dearborn against General Putnam in the "Account." The first which we shall notice is of a special nature. It is the charge of cowardice at the battle of Bunker Hill. It appears to us that this charge is necessarily implied in the "Account." General Putnam is there coupled with Colonel Gerrish, and they are represented as retreating side by side, "without discharging a single musket." The conduct of General Putnam is there represented as being similar in every respect to that of Colonel Gerrish. And Colonel Gerrish, the author of the "Account," tells us, in consequence of this conduct was arrested for cowardice, tried, cashiered, and universally execrated, and that General Putnam was saved from a like fate only by his extraordinary popularity. And that when General Putnam's ephemeral and unaccountable popularity had subsided or faded away, the selection of Colonel Gerrish as a "scapegoat" was considered a mysterious and inexplicable event. That is, that although Colonel Gerrish was guilty of cowardice, and merited the punishment inflicted upon him, and justly

suffered "universal execration," yet it was "mysterious and inexplicable" that General Putnam, who was guilty of a similar offence, should escape a similar fate; that is, that it was quite mysterious and inexplicable that General Putnam was not arrested for cowardice, tried, cashiered, and subjected to universal execration.

The second charge is of a more general nature. It not only accuses General Putnam of cowardice at the battle of Bunker Hill, but denies him merit as a soldier generally, and his claim also to the applause bestowed upon him by the people, whose minds, the author of the "Account" tells us, were at that time under the "shackles of a delusive trance." We think we are justified in this inference, and shall leave it to the public to judge, whether these charges are not contained in the few sentences which we have quoted, and are also willing to risk the assertion, that the whole tenor and spirit of the "Account" breathes these charges throughout.

Let us turn our attention, in the next place, to the nature and the degree of evidence adduced in support of these charges. And here, even admitting that General Dearborn has not deprived himself of the full benefit of his own testimony by voluntarily preferring these charges, we cannot but doubt his competency to speak so decisively upon the conduct of General Putnam on the field of battle.

He was a platoon officer, commanding twenty or thirty men, and engaged, like them, in loading and discharging his musket. This does not seem to be a station which gave him such a view of things as authorizes him to say, of his own knowledge, what was or was not the conduct of a general officer. He could speak much better, probably, of the conduct of the platoon under his command. "'T was but a part he saw, and not the whole."

We should not expect to find General Dearborn resorting, in any case, to this sort of evidence to estimate the merits of a military man. His experience, it was natural to suppose, might have taught him how incompetent subalterns are to speak of the merits of their superiors, either as to courage or conduct. He has had occasion to notice the general injustice of such opinions, and it would seem that he must have seen

and felt the impropriety of bringing General Putnam's reputation and character to be tried by any such standard. Although he may now be, or may have lately been, a major-general, yet it is only the evidence of Captain Dearborn which he produces on this occasion against General Putnam. Among military men, we imagine, nothing will be esteemed worse than this appealing downwards on questions of military behavior. According to this process, a captain is to decide how well his colonel (or, in this case, a general officer) executes his command and performs his duty; and the captain himself must find a voucher for his own good behavior in the certificate of some soldier in a platoon. Those are to judge how commands are executed who do not know what the commands are; and he who sees the least of all is to be the judge over all.

For the purpose of satisfying unprejudiced minds, who might conceive that there were some grounds for doubting the general correctness of his observations, General Dearborn has, since the appearance of the "Account," procured and published the letters, certificates, and depositions of sundry persons, relative to the battle.

General M'Clary of New Hampshire, in a letter to the son of General Dearborn, says :

"I was, the principal part of the time the battle continued, near to Colonel Stark, who commanded the regiment to which I belonged, and on our retreat from Breed's Hill, in ascending Bunker's Hill, and arriving on its summit, I well remember of seeing General Putnam there, on his horse, with an iron spade in his hand, which was the last I saw of him on that day. Being an officer in the company under the command of your father, I had an opportunity of knowing the circumstances generally attending the battle, and if General Putnam had been there, I should have known it."

General M'Clary was, we believe, an ensign in Captain Dearborn's company. General Pierce of New Hampshire says :

"I went on to the Hill about eleven o'clock, A. M., on the 17th; when I arrived at the summit of Bunker's Hill, I saw two pieces of cannon there standing, with two or three soldiers standing by them, who observed they belonged to Captain Callender's com-

pany, and said that the captain and his officers were cowards, and that they had run away. General Putnam there sat upon a horse. I saw nobody at that place when I arrived there, but the General and those two or three soldiers. General Putnam requested our company, which was commanded by Captain John Ford of Chelmsford, Massachusetts, to take those two pieces of cannon, and draw them down; our men utterly refused, and said they had no knowledge of the use of artillery, and that they were ready to fight with their own arms. Captain Ford then addressed his company in a very animated, patriotic, and brave strain, which is the characteristic of the man. The company then seized the drag-ropes and soon drew them to the rail fence, according to my recollection, about half the distance from the redoubt on Breed's Hill to Mystic River. I think I saw General Putnam at that place, looking for some part of his sword. I did not hear him give any orders or assume any command, except at the top of Bunker's Hill, when I was going to the field of battle."

Two or three other persons declare that they were in the battle, and did not see General Putnam there. Captain Trevett, who commanded a company of artillery from Marblehead, attached to Colonel Gridley's regiment, says that he saw him on Bunker's Hill, while he himself was going to Breed's Hill, and on his return saw him again at the same place.

Major Stark, the son of General Stark, writes that he recollects substantially all that General Dearborn has written, having been in the battle. In a letter to General Wilkinson in 1815 this gentleman also says, "Your account of General Putnam corresponds with what I have always understood of his conduct that day." The account here referred to is contained in a letter from General Wilkinson to Major Stark, in which the writer says, "General Dearborn informs me that General Putnam was fuming and vociferating on Bunker Hill, sixty or eighty rods in the rear, and, although invited, did not come up to the fire." This account, then, is the account of General Dearborn, not of General Wilkinson. Major Stark adds, with becoming caution, that "his juvenile years did not entitle him to [enable him to obtain] any better than commonplace information. The Reverend Mr. Bently says that he saw General Stark in 1810, and that he was then informed by him

that if General Putnam had done his duty, he would have decided the fate of his country in the first action.

The Honorable Abel Parker, now a judge in New Hampshire, says :

“In the time of this heavy fire” (that is of the artillery from Boston) “I, for the first time that day, saw General Putnam standing with others under cover of the north wall of the fort, where, I believe, he remained until the British troops made their appearance in their boats. At this time the artillery was withdrawn from the fort, but by whose order I know not; and General Putnam at or near the same time left the fort. The removing of the artillery, and General Putnam’s departure, took place a little before (if my memory be correct) the New Hampshire troops made their appearance on the hill. I saw them when they arrived, and witnessed their dexterity in throwing up their breast-work of rails and hay. When the British first made their attack with small arms, I was at the breast-work, where I remained until I received my wound from the party who had flanked it; I then went into the fort, where I remained until the order to retreat was given by Colonel Prescott. After my arrival at the fort, I had a perfect opportunity of viewing the operations of the day, and distinctly noticed Colonel Prescott as the only person who took upon him any command. He frequently ordered the men from one side to other, in order to defend that part which was pressed hardest by the enemy; and I was within a few yards of him, when the order to retreat was given; and I affirm that at that time General Putnam was not in the fort, neither had he been there at any time after my entering the same; and I have no hesitation in declaring that the story told by Colonel Small to Colonel Trumbull, concerning General Putnam’s saving him from the fire of our men at that time, is altogether unfounded.”

We learn from these statements of General Pierce and Judge Parker that General Putnam most assuredly was on the field, at the rail fence at one time, and near the fort at another. These are distinct denials of General Dearborn’s statement that he was in the rear, on Bunker Hill, the whole time.

Whoever considers the nature and circumstances of this battle will not be at all surprised, if there should appear to have been some degree of complaint and fault-finding among those engaged. It was a battle almost won,—but yet lost.

The place was not finally defended. The pinnacle of success had been almost reached, not quite. The prize had been seized, as it were, but not holden. Out of the disappointed feelings, natural to such an occasion, some crimination and recrimination might be expected to arise. Even the gallant Prescott, a man of a noble, generous, and magnanimous nature, would not willingly surrender his redoubt; nor is it strange that he might think it possible for others to have given him better support. He found himself, in his little fortress, and on his leaving it, to pass through a gateway enfiladed by the British musketry, in a condition somewhat like that in which Jugurtha is described by Sallust, "*Dum sustentare suos, et prope jam adeptam victoriam retinere cupit, circumventus ab equitibus, dextra, sinistra, omnibus occisis, solus inter tela hostium vitabundus erumpit.*"

Properly and strictly speaking, there was no commander-in-chief in the battle. The troops from the different States were strangers to each other. The battle itself was unexpected, and may be said to have been accidental. No weight should be given to the opinions engendered in such a state of feelings against any man's conduct; especially when we take into the account the entire want of discipline in the army, and of concert among its leaders, and when we remember that all depended on that spirit of enthusiasm which glowed in the breast of every soldier, and which led him, under the circumstances of the case, to look upon himself as his own commander. A very ordinary degree of candor would induce the belief, that if there had been grounds of complaint against any officer, at that time, not of a shadowy and unsubstantial nature, they would have been attended to and investigated. That was certainly a jealous period. Every officer was watched, because it was the beginning of a civil war, and dangers were to be apprehended, not only from cowardice but from defection. If those who knew General Putnam's behavior at that time found no fault with it, the presumption is that no fault could be found with it. And those whose lips were silent then, when well founded complaints would have been a duty, must, long afterwards and after the death of the party, be heard not without much abatement and allowance,

Let us now, however, turn our attention to the accused, and see what can be produced to repel or answer the evidence against him.

The following is quoted from a letter written by Judge Grosvenor, of Pomfret, addressed to Colonel Daniel Putnam, son of General Putnam.

“Being under the command of General Putnam, part of our regiment and a much larger number of Massachusetts troops under Colonel Prescott were ordered to march, on the evening of the 16th of June, 1775, to Breed’s Hill, where, under the immediate superintendence of General Putnam, ground was broken and a redoubt formed. On the following day, the 17th, dispositions were made to deter the advance of the enemy, as there was reason to believe an immediate attack was intended. General Putnam during the period was extremely active, and directed principally the operations. All were animated, and their general inspired confidence by his example. The British army having made dispositions for landing at Morton’s Point, were covered by the fire of shot and shells from Copp’s Hill, in Boston, which it had opened on our redoubt early in the morning, and continued the greatest part of the day. At this moment a detachment of four lieutenants (of which I was one) and one hundred and twenty men, selected the preceding day from General Putnam’s regiment,* under Captain Knowlton, were, by the general, ordered to take post at a rail fence on the left of the breast-work, that ran north from the redoubt to the bottom of Breed’s Hill. This order was promptly executed, and our detachment, in advancing to the post, took up one rail fence and placed it against another (as a partial cover), nearly parallel with the line of the breast-work, and extended out left nearly to Mystic River. Each man was furnished with one pound of gunpowder and forty-eight balls. This ammunition was received, however, prior to marching to Breed’s Hill.

“In this position our detachment remained until a second division of British troops landed, when they commenced a fire of their field artillery of several rounds, and particularly against the rail fence; then, formed in columns, advanced to the attack, displayed in line at about the distance of musket shot, and commenced firing. At this instant our whole line opened upon the enemy, and

* The general officers from Connecticut, in the campaign of 1775, had each a regiment, with lieutenant-colonels under them.

so precise and fatal was our fire, that in the course of a short time they gave way and retired in disorder out of musket shot, leaving before us many killed and wounded.

“There was but a short respite on the part of the British, as their lines were soon filled up and led against us, when they were met as before, and forced back with great loss.

“On reinforcements joining the enemy, they made a direct advance on the redoubt, and being successful, which our brave Captain Knowlton perceiving, ordered a retreat of his men, in which he was sustained by two companies under the command of Captains Clark and Chester.

“The loss in our detachment, I presume, was nearly equal. Of my own immediate command of thirty men and one subaltern, there were eleven killed and wounded; among the latter was myself, though not so severely as to prevent my retiring.

“At the rail fence there was not posted any corps save our own under Knowlton, when the firing commenced; nor did I hear of any other being there till long after the action. Other troops, it was said, were ordered to join us, but refused doing so.

“Of the officers on the ground, the most active within my observation, were General Putnam, Colonel Prescott, and Captain Knowlton; but no doubt there were many more, equally brave and meritorious, who must naturally have escaped the eye of one attending to his own immediate command.”

The following is from a letter from Colonel John Trumbull, the painter.

“In the summer of 1786, I became acquainted, in London, with Colonel John Small, of the British army, who had served in America many years, and had known General Putnam intimately during the war of Canada from 1756 to 1763. From him, I have the following anecdote respecting the battle of Bunker Hill; I shall nearly repeat his words. Looking at the picture which I had then almost completed, he said: ‘I don’t like the situation in which you have placed my old friend Putnam; you have not done him justice. I wish you would alter that part of your picture, and introduce a circumstance which actually happened, and which I can never forget. When the British troops advanced the second time to the attack of the redoubt, I, with the other officers, was in front of the line to encourage the men; we had advanced very near the works undisturbed, when an irregular fire, like a *feu-de-*

joie, was poured in upon us ; it was cruelly fatal. The troops fell back, and when I looked to the right and left, I saw not one officer standing ; I glanced my eye to the enemy, and saw several young men levelling their pieces at me ; I knew their excellence as marksmen, and considered myself gone. At that moment my old friend Putnam rushed forward, and, striking up the muzzles of their pieces with his sword, cried out, ‘For God’s sake, my lads, don’t fire at that man — I love him as I do my brother.’ We were so near each other, that I heard his words distinctly. He was obeyed ; I bowed, thanked him, and walked away unmolested.

“Colonel Small had the character of an honorable, upright man, and could have no conceivable motive for deviating from truth in relating the circumstances to me ; I therefore believe them to be true. You remember, my dear sir, the viper biting the file. The character of your father for courage, humanity, generosity, and integrity is too firmly established, by the testimony of those who did know him, to be tarnished by the breath of one who confesses that he did not.

“Accept, my dear sir, this feeble tribute to your father’s memory, from one who knew him, respected him, loved him — and who wishes health and prosperity to you and all the good man’s posterity.”

The truth of the foregoing anecdote derives confirmation from the testimony of Colonel Daniel Putnam, who informs us in his “letter,” that the same was related to him by his father soon after the battle, and that there was also an interview between Colonel Small and General Putnam, on the lines between Prospect Hill and Bunker Hill, not long after the action.

[Mr. Webster here cited a letter from Judge Winthrop of Cambridge, dated June 18, 1818, and continued as follows:]

General Humphreys in his life of Putnam, speaking of the battle, says : “The presence and example of General Putnam were not less conspicuous than useful. He did everything that an intrepid and experienced officer could accomplish. The enemy pursued to Winter Hill. Putnam made a stand and drove them back under cover of their ships.”

An account of the battle, published in one of the newspapers at the time, states :

"The action continued about two hours, when the regulars on the wing were put in confusion and gave way. The Connecticut troops closely pursued them and were on the point of pushing their bayonets, when orders were received from General Pomeroy for those who had been in the action two hours to fall back, and their places to be supplied with fresh forces. These orders being mistaken for a direction to retreat, our troops on the right wing began a general retreat, which was handed to the left, the principal place of action, where Captains Knowlton, Chester, Clark, and Putnam had forced the enemy to give way, and retire before them for some considerable distance, and being warmly pursuing the enemy, were with difficulty persuaded to retire; but the wing, by mistaking the orders, the left, to avoid being encircled, were obliged to retreat with the main body."

The position of some part of these Connecticut troops is confirmed by the statement of Mr. Adams, who now resides near the memorable spot, and at whose house Captain Knowlton's company was quartered. He informs us that this company went upon the hill by order of General Putnam. After their return they mentioned to Mr. Adams that they fought behind a kind of breast-work, made of rail fence and new mown grass, and that this was erected by themselves.

[Mr. Webster here gave affidavits and statements of soldiers who were engaged in the battle. He then proceeded as follows:]

The general result of this evidence, we think, is decisive to disprove a very important part of General Dearborn's statement.

General Dearborn declares in the "Account," "that General Putnam remained at or near the top of Bunker Hill until the retreat, with Colonel Gerrish by his side; that he not only continued at that distance during the whole of the action himself, but had a force with him nearly as large as that engaged."

And General Wilkinson says that General Dearborn stated to him that, "Putnam was fuming and vociferating on Bunker Hill, sixty or eighty rods in the rear, and although invited, did not come up to the fire."

Now, we think, the fact that General Putnam did not remain on Bunker Hill during the whole action, but was actually

present on Breed's Hill, is completely proved. Two of the persons whose certificates General Dearborn has published, allege this expressly. General Pierce says he saw him at the rail fence, and Judge Parker says that he saw him at the fort or redoubt. And, in addition to these, there is the positive declaration of Judge Grosvenor, Judge Winthrop, and the other persons whose depositions are given above. And we have little doubt that hundreds of other depositions to the same effect might be obtained. Our belief is founded on the very numerous declarations which, we learn, have been made to the judges, by soldiers in the Revolutionary army, applying for pensions under the late law. This is a weight of testimony not to be resisted, surely, by the negative evidence resulting from the declaration of those who say they did not see him.

General Dearborn's statement is, not that he did not see General Putnam, but that General Putnam was not there. He alleges the fact; and the fact, as he states it, is utterly irreconcilable with the testimony of others. Instead of "fuming and vociferating in the rear," and refusing to come up, though invited, — if the witnesses are to be credited, he was actually and zealously engaged in the battle itself.

The carrying off, with his own hands, of a part of the intrenching tools, is mentioned in a sort of half reproachful manner by General Dearborn, — but we see not with what propriety. If no other and higher duty were omitted, his attention to these minor objects, and his willingness to perform the labor of others, are not to his disadvantage. It was contemplated to throw up another work immediately, farther in the rear, which indeed was actually begun; and General Putnam had experienced enough to know that a militia army is apt to be in want of indispensable utensils. For this reason, he insisted on bringing off the intrenching tools, and set the example himself. Does not this circumstance, instead of exciting an ill-timed sneer, rather unite with the other parts of his conduct to remind one of a celebrated classical description of a general in battle? "*In prima acie versari, laborantibus succurrere, integros pro sauciis arcessere; omnia providere; multum ipse pugnare, sæpe hostem ferire; strenui militis, et boni imperatoris officia simul exsequebatur.*"

Taking the evidence together, we apprehend the following to be a true general account of General Putnam's conduct on this occasion. He came over from Cambridge, with a part of the Connecticut troops, the night before the battle, and directed and assisted in throwing up the redoubt. He was on the field of battle, at or about the time the action commenced, at the rail fence. At some period, during the battle, he probably went back to bring up the residue of his own regiment. He may possibly have gone back more than once for this purpose. He was encouraging the troops, giving command, passing along the lines, and partaking of all the danger of the occasion, in the heat of the engagement, at the rail fence. When the British made the last attack, which was confined principally to the redoubt, he might have been gone to bring up the other troops. If so, this would explain a fact which has been asserted, that Colonel Prescott, on his retreat, met General Putnam. He was not in the redoubt at any time during the battle. That post was Prescott's. His command and operations were confined to the troops which lined the rail fence, and perhaps the breast-work. It should be understood that the redoubt and breast-work were on a line. But the rail fence was not on a line with these, but considerably in the rear, and much nearer Bunker Hill. If General Putnam had been at the rail fence itself, when Colonel Prescott retreated, the latter might be said to have met with, or, in more correct terms, to have passed the former. The contiguity of the rail fence to Bunker Hill may explain the passing, even perhaps more than once, of General Putnam from the one to the other. It has little tendency to prove the absence of General Putnam from the field at the time of the battle, that troops passed him as they went to Breed's Hill, or as they returned from it. They went before the battle, and returned afterwards; and an officer on horseback certainly is able to move with more velocity than a corps of infantry. It was an open field, not a straight and narrow path, that led to the redoubt, the breast-work, and the rail fence. Officers no doubt traversed the field, sometimes meeting troops, sometimes passing them, in various directions, as their duty required. No part of the fight was hotter or more fatal than at that part of the line occupied by Knowlton's

company. Mr. Grosvenor, it will be recollected,—who testifies to the presence of General Putnam on the spot, and at the moment,—belonged to this company. In order to understand the operations of the day, it should be borne in mind that the object of the British was to dislodge the troops from the redoubt. To effect this object, in addition to the firing kept up by the artillery from Boston, an attempt was made to cut it off from succors in the rear. The first operation of the British infantry was a movement on the flank; and it was to prevent the success of this movement that the rail fence was thrown up. Being repulsed in this attempt, the British, on the arrival of the reinforcement, changed their mode of operation, and proceeded to a direct assault of the fort itself, in which they succeeded. The following extract from the account published at the time by the Massachusetts Congress, is quite intelligible :

“Our troops, within their intrenchments, impatiently awaited the attack of the enemy, and reserved their fire until they came within ten or twelve rods, and then began a furious discharge of small arms. This fire arrested the enemy, which they for some time returned, without advancing a step, and then retreated in disorder and with great precipitation to the place of landing, and some of them sought refuge even within their boats. At length they were rallied, and marched up, with apparent reluctance, towards the intrenchments; the Americans again reserved their fire until the enemy came within five or six rods, and a second time put the regulars to flight, who ran in great confusion towards their boats. They formed once more, and having brought some cannon to bear in such a manner as to rake the inside of the breast-work from one end of it to the other, our troops retreated within their little fort. The ministerial army now made a decisive effort. The fire from the ships and batteries, as well as from the cannon in front of their army, was redoubled. They attacked the redoubt on three sides at once. The breast-work on the outside of the fort was abandoned; our ammunition was expended, and but few of our men had bayonets to affix to their muskets. Can it then be wondered that the word was given by the commander of the party to retreat? But this he delayed till the redoubt was half filled with regulars, and our troops had kept the enemy at bay some time, confronting them with the butt-end of their muskets. The retreat of this little handful of brave men would have been effectually cut off, had it

not happened that the flanking party of the enemy, which was to have come upon the back of the redoubt, was checked by a party of our men" (that is, the party at the rail fence), "who fought with the utmost bravery, and kept them from advancing farther than the beach; the engagement of these two parties was kept up with the utmost vigor; and it must be acknowledged that this party of the ministerial troops evinced a courage worthy of a better cause; all their efforts however were insufficient to compel their equally gallant opponents to retreat, till their main body had left the hill; perceiving this was done, they then gave ground, but with more regularity than could be expected of troops who had no longer been under discipline, and many of whom never before saw an engagement."

The fact is, that the troops at the rail fence, a part of which belonged to Putnam's regiment, and were more immediately under his command, never were repulsed and did not retreat till the fort itself, the whole original object of the battle, was abandoned. The deficiency of force was in the redoubt, and if Putnam had been able to have reinforced Prescott there, it would have been in the highest degree advantageous. But this does not appear to have been in his power, for it seems to have been with the greatest difficulty that the flanking parties of the enemy were kept from entirely surrounding the fort.

If, however, we are mistaken in the result of this evidence, and it be not yet proved that General Putnam was actually in the battle, or even if it should be or could be proved, on the other hand, that he was not in the battle, still the charge brought by General Dearborn is not at all made out. The charge is a charge of misbehavior and cowardice. To make this good, much more would be necessary than to prove his absence from the field. It must be shown that he ought to have been there; that it was his duty to be there; that he had a command there; and that his absence was imputable to personal fear, and was in disobedience of orders, and violation of duty. It cannot be forgotten, that the amount of what General Dearborn has said is as we have stated; and whether Putnam was in the battle or not, is not the main question; but the main question is, was he guilty of cowardice, and did he

deserve execration? It is needless, we think, to state that no such charge is in the least degree supported by the evidence.

We have hitherto omitted to notice General Dearborn's account of the conversation at Governor Bowdoin's table, and the expression of Colonel Prescott, relative to General Putnam, on that occasion. And we have also forborne to quote the statements of the Reverend Messrs. Chaplin and Bullard; an extract of which, however, we must now lay before our readers. "Colonel Prescott informed us repeatedly, that when a retreat was ordered and commenced, and he was descending the hill, he met General Putnam, and said to him, 'Why did you not support me, general, with your men, as I had reason to expect, according to agreement?' Putnam answered, 'I could not drive the dogs up.' Prescott pointedly said to him, 'If you could not drive them up, you might have *led* them up.'"

We have no disposition to question the personal veracity of General Dearborn; although we think there is just and great reason to complain of his habit of round and sweeping assertion, and of delivering his own opinions and impressions as so many positive facts. We know too the high reputation and character of the reverend gentlemen from whose account we have taken the foregoing quotation. Notwithstanding all this, we are willing to believe that some misapprehension or misrecollection exists in regard to both these relations. We indulge this feeling as much, at least, out of regard to Prescott as to Putnam. The first of these reported expressions is of that sort which justifies a suspicion that it may be at least a translation of Colonel Prescott's remarks into the language of the author of the "Account." It is too late to inquire into the truth of this reported conversation, either from Colonel Prescott or Governor Bowdoin. It must, therefore, rest on the declaration of General Dearborn, which never can be contradicted. But who can be reconciled to the manner in which this declaration, whether accurately reported or not, is now made public? General Dearborn probably knows that Colonel Prescott and General Putnam kept up a friendly acquaintance during their lives. He knows that these two officers have left sons, reputable and distinguished in the society of the present times. Does he choose to be the occa-

sion of heart-burnings and strife among the sons of brave men? If he finds men of respectability entertaining towards each other sentiments of friendship and esteem, does he feel it his duty to say to them, "The father of one of you pronounced the father of the other to be a coward?" Whether we look to the truth and value of historic narrative, to the character of the dead, or the feelings of the living, we see enough to induce us to mark, as far as our expression of decided disapprobation may mark, the recital in such coarse terms of table conversation, even if there were less reason than there is, to think that such conversation was not misunderstood or misrecollected.

We hope that Messrs. Chaplin and Bullard may have imputed to Colonel Prescott, through mistake, observations they may have heard from others. Their regard for Prescott cannot be greater than ours, and we repeat that it is on his account we are willing to suppose that there is some error in these reported conversations. In this reply, said to have been given by Prescott to Putnam in the field, there is a tartness and an air of wit which would seem to render a later origin of the remarks probable. These smart sayings and epigrammatic speeches are more generally made after than on the occasion.

But even admitting that Prescott made use of these or similar declarations, we think they weigh little against Putnam. There was no plan or concert among the leaders. Each was to be the sole and exclusive judge of the course most proper to be pursued. No one, of course, could correctly decide upon the conduct of another in this state of things.

As to the anecdote related by Colonel Small, we are not certain that it ought not to be believed, although it must be confessed, it wears a little the aspect of romance. But we know that Putnam was well acquainted with very many of the British officers, and Colonel Small among others, that they had a very high regard for him, and that he entertained towards them the friendly spirit of a former companion. There is, and can be, no doubt that Colonel Small has stated this fact; and there is the positive declaration of Colonel Putnam that his father mentioned the same occurrence to him shortly after it happened. Very probably there is one mistake into which Colonel Trumbull may have fallen, and which has given rise

to the contradiction of Colonel Small's account to Judge Parker's. It was not at the redoubt that this happened, but at the breast-work, or the rail fence. Admitting this to have crept into the account given by Colonel Trumbull, the essential facts remain altogether contradicted.

We shall only add in relation to General Putnam's conduct in the battle of Bunker Hill, the following extracts, which we shall leave to make their proper impression, without further note or comment.

From the Honorable William Tudor :

"Soon after the arrival of General Washington as commander-in-chief of the American forces at Cambridge, in July, 1775, — courts martial were ordered to be holden for the trials of different officers, who were supposed to have misbehaved in the important action on Breed's Hill, on the 17th of June; at all of which I acted as judge advocate. In the inquiry which these trials occasioned, I never heard any insinuation against the conduct of General Putnam, who appeared to have been there without any command; for there was no authorized commander. Colonel Prescott appeared to have been the chief."

From the Honorable John Adams to Daniel Putnam, Esq. :

"QUINCY, June 5, 1818.

"You ask whether any dissatisfaction existed in the public mind against General Putnam, in consequence of any part of his conduct on the 17th of June, 1775. I was in Philadelphia from the 5th of May through the summer of 1775, and can testify as a witness to nothing which passed at Charlestown on the 17th of June.

"But this I do say without reserve, that I never heard the least insinuation of dissatisfaction with the conduct of General Putnam through his whole life. And had the characters of General Green, General Lincoln, General Knox, General La Fayette, or even General Warren, General Montgomery, or General Mercer been called in question, it would not have surprised me more. There must have been some great misunderstanding in this affair. I seem to see intuitively, or to feel instinctively the truth of Major Small's testimony; but it would require a sheet of paper to state what I have in memory, relative to Major Small and General Warren."

But, as we before stated, the author of the "Account" not only charges General Putnam with misbehavior at the battle of Bunker Hill, but denies him merit as an officer generally. He says his popularity was "ephemeral" and "unaccountable," and that when it had faded away, "and the minds of the people were released from the shackles of a delusive trance, the circumstances relating to Bunker Hill were viewed and talked of in a very different light, and that the selection of the unfortunate Colonel Gerrish as a scapegoat was considered as a mysterious and inexplicable event."

Now is it true that General Putnam's popularity ever faded away? Did it prove to be ephemeral? When did it subside? Who released the people from their delusive trance, and who were those wise persons who, after this had happened, talked of the circumstances of the battle in a very different light? Who are they who considered the arrest of Colonel Gerrish as the selection of a scapegoat, and a mysterious and inexplicable event?

If the author of the "Account" alleges that subsequent events so far developed either Putnam's general character, or the merit of his conduct at the battle of Bunker Hill, as to have seriously and injuriously affected his reputation, he ought to prove what he alleges. He has given no evidence of it. We know of none, in history, or tradition. We believe that General Putnam retained his reputation till his death. His popularity, which is called "ephemeral" and "unaccountable," was founded on a long course of useful services, as will appear by a brief recurrence to the history of his life.

General Putnam was born at Salem, in this State, but went to Connecticut at the age of twenty or twenty-one. At the breaking out of the war between France and England, in 1756, — commonly called in this country the French War, — he was appointed captain of a company of provincial troops, to serve against the French and Indians. "It is not," said Mr. Ames, "in Indian wars that heroes are celebrated, but it is there they are formed." Of this discipline, Putnam had a full share. He was created a major in 1759, in which year he distinguished himself by his uncommonly good conduct in extinguishing a fire which had broken out in the barracks at Fort Edward, and

threatened the magazine, which was within twelve feet of the barracks. Notwithstanding the utmost efforts of the troops, the fire continued to make progress, and to approach the magazine.

[Mr. Webster here quoted from Humphreys' Life of Putnam a description of General Putnam's conduct in this fire, and an account of his treatment by the Indians soon after. He continued as follows:]

Putnam was carried to Canada; afterwards exchanged, promoted to be a colonel, and served through the remainder of the war. When the peace of 1763 took place, "at the expiration of ten years from his first receiving a commission, after having seen as much service, endured as many hardships, encountered as many dangers, and acquired as many laurels as any officer of his rank, with great satisfaction he laid aside his uniform, and returned to his plough."

General Putnam took an early and deep interest in the questions which grew out of the Stamp Act, and in all that related to the dispute between England and America. The battle of Lexington at length put this dispute to the arbitration of the sword. "Putnam, who was ploughing when he heard the news, left his plough in the middle of the field, unyoked his team, and without waiting to change his clothes, set off for the theatre of action. But finding the British retreated to Boston, and invested by a sufficient force to watch their movements, he came back to Connecticut, levied a regiment under authority of the Legislature, and speedily returned to Cambridge." The progress of his promotion in the Revolutionary army is stated in his son's "Letter to General Dearborn." His services are well known, and we believe justly appreciated by the country. A paralytic shock compelled him to retire in December, 1779, holding at that time the second rank of command in the American army. We shall add only an extract from an affectionate letter of General Washington to General Putnam, in June, 1783.

"DEAR SIR: Your favor of the 20th of May, I received with much pleasure. For I can assure you, that, among the many worthy and meritorious officers with whom I have had the happi-



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Goussier & Co. Paris.

ness to be connected in service through the course of this war, and from whose cheerful assistance in the various and trying vicissitudes of a complicated contest, the name of a Putnam is not forgotten ; nor will it be, but with that stroke of time which shall obliterate from my mind the remembrance of all those toils and fatigues through which we have struggled for the preservation and establishment of the rights, liberties, and independence of our country."

Even the slight review which we have been able to take of General Putnam's previous military services, will, we think, be sufficient to satisfy any one that his popularity, when he joined the army at Cambridge, was not "unaccountable."

General Putnam was an uneducated man. In the science of his profession he could not, of course, be greatly accomplished. He made his way by the force and enterprise of his character, and his devotion to the public interest. He was suited to the times, and the times were suited to him. Habituated, from early life, to an acquaintance with the militia, trained in the school of Indian and colonial warfare, of integrity above suspicion, and of courage not to be doubted, much esteemed by the people of Connecticut, and a warm friend to the Revolution, it could hardly be otherwise than that he should possess that weight and consideration which is called an "unaccountable popularity."

We shall now take leave of this subject, so far as General Putnam is concerned. There remain, however, a few remarks upon other topics. It has already been observed that the "Account" contains several things worthy of being communicated to the public ; but if it is put forth as a full and ample narrative of all that took place in the battle, and all that related to it, it is greatly deficient. The author, as we have seen, does not spare censure where he thinks it deserved, and in some instances withholds not praise ; but in others he is silent where the highest commendation is due. If we mistake not, he only mentions Prescott once, in the whole account, and then merely for the purpose of reciting his conversation at Governor Bowdoin's. Now we have no idea of a just and proper account of the battle of Bunker Hill which does not place Colonel Prescott in a conspicuous posture. In any true

picture he ought to stand out from the canvas in the most prominent manner. He commanded the most important post; nobody had a right to command over him; and he acquitted himself with great gallantry.

Perhaps it may not be generally known that he solicited this command. Yet such, we believe, was the fact. We have a letter before us from the Rev. Mr. Whitney of Pomfret, in which he states that at Cambridge, the evening before the battle, he was present at the headquarters of the army, when Prescott solicited to be put on this service.

The author of the "Account" says, that no officer assumed the command, undertook to form the troops, or gave any orders in the course of the action, that he heard, except Colonel Stark. This is most extraordinary. Did Prescott assume no command? Did he give no orders? Who commanded in the redoubt, the great and important point in the field? In truth, if there was any commander-in-chief in the action, it was Prescott. From the first breaking of the ground to the retreat, he acted the most important part, and if it were now proper to give the battle a name, from any distinguished agent in it, it should be called Prescott's Battle.

Towards the conclusion of the "Account" we find the following paragraph: "General *Ward*, then commander-in-chief, *remained at his quarters at Cambridge*, and apparently took no *interest or part* in the transactions of the day." The words in italics are thus printed in the "Account." The author undoubtedly intends that they shall have a meaning; and that that meaning shall be a reproach on the character of General Ward. He remained at his quarters in Cambridge, it is said. This is very true, for he was commander-in-chief of the Massachusetts troops, and Cambridge was headquarters. The troops that fought the battle were detached to do a particular service, and that service unexpectedly led to an engagement. But it is said that General Ward apparently took no interest (with an emphasis on the expression) in the transactions of the day. What ground for this assertion? The author did not see General Ward; he knew nothing of his counsels, his resolutions, or his conduct. How then can he say that he took no interest in the transactions of the day? Merely because

General Dearborn did not see General Ward at Bunker Hill, where, as far as appears, it was not his duty to be,—this round, bold, and wholly unauthorized declaration is made, that he apparently took no interest in the transactions of the day. This license of speech is altogether unpardonable. We can find no apology for it on an occasion in which the writer professes that his object is to perform the duty which he owes “to the characters of those brave officers who bore a share in the hardships of the Revolution.”

That General Ward did take a most anxious interest in the transactions of that day, the consultations had with his officers, and the reasons which governed him, in relation to the reinforcements for the battle,—may be learned from many who partook in those consultations, and who know those reasons. Among others, we have no doubt that Governor Brooks—who passed under the fire of the enemy’s ships and gunboats, from the place of the battle to Cambridge, for reinforcements, which were ordered by General Ward—can speak satisfactorily to this point.

In undertaking the labor of collecting and transcribing the evidence which we have now laid before the public, and in making the remarks with which we have accompanied it, we have been exclusively governed by that regard to character which we ever wish to cherish in ourselves and in the community. We have espoused no private controversies, nor composed this article from the impulse of any private or personal feeling.

We have lately had occasion to call the attention of our readers to the life of Patrick Henry. In that work, we thought the author had gone to the extreme of commendation, and bestowed his praises with too liberal a hand. He seemed to put his heart into his work, and to feel that he elevated his own character, and the character of the State to which he belonged, in proportion as he raised the reputation of the subject of his biography. The duty which he thought he owed to posterity was to present a portrait of his countryman drawn with all the favor and to the utmost advantage, to say the least of it, which truth would permit.

How different, in all respects, is the spirit of the work

which we have here noticed. The contrast which these productions manifest, in relation to the sort of feelings in which they originated, and their widely different tendency and consequences, open a very interesting topic, from which we must forbear for the present, but on which it is time that some one, who sees and feels its importance, should address himself to the good sense of New England. Let us remember that we have nothing more precious than the reputation of our distinguished men, civil or military, living or dead. Let us deprecate the spirit that depreciates merit; and let us embrace in all its extent and spirit, that maxim, — full of the soundest wisdom and fit to be urged, again and again, with all possible earnestness, — character is power.

Wheaton's Reports, Vol. III.

NORTH AMERICAN REVIEW, December, 1818.

Reports of Cases argued and adjudged in the Supreme Court of the United States, February Term, 1818. By Henry Wheaton, Counsellor at Law. Vol. 3. New York, 1818, pp. 644.

THOSE, who have embraced the notion of the practicability and utility of a written code of laws, extending to all possible cases which arise in the intercourse of men, and who look upon the influence of the unwritten or common law as an oppressive domination, will naturally lament the appearance of every new volume of the Reports of legal decisions. To them it can only seem another rivet to their fetters. It is only so much more construction. Instead of being a collection of statutes, it is only a book containing the grave deliberations of judges, in cases arising under the common law or under statutes already in existence. We do not belong, however, to this fraternity. Feeling no disposition to estimate lightly the usefulness of legislation, it yet appears to us to be among the idlest and weakest theories of the age, that it is possible to provide, beforehand, by positive enactment, and in such manner as to avoid doubts and ambiguities, for all questions to which the immense variety of human concerns gives rise. An opinion of this sort becomes so important as to deserve refutation, only in consequence of the apparent gravity, with which some distinguished men in the learned world have treated it.

And upon this subject, to use the words of Mr. Windham, two reflections arise: first, that we ought to take care how we begin new eras in legislation; secondly, that we ought to have a reasonable distrust of the founders of such eras, lest they should be a little led away by an object of such splendid ambition, and be thinking more of themselves than of the credit of the laws or the interests of the community.

The theory, if we understand it, is this. A set of wise and philosophical legislators could frame a system of laws, so complete, so comprehensive, and so certain, that no case could arise which would not find its solution in some part of the *Lex Scripta*, the universal statute ; and that all the provisions of this written law would be understood without the aid of construction, precedent, collation, or analogy. In such a state of things, precedent, of course, would cease to have force or application ; analogy would be useless, and commentary vain.

Those who do not suppose all this quite possible, yet think a good deal might be obtained. There might be almost a complete provision for all cases, and very little need be left to the commentaries of the learned or the decisions of judges.

A very little reflection, we should think, would dissipate all such ideas. The simple truth is, that legislation can do no more than establish principles. The combination, modification, and application of these principles must be left to those who administer the laws. And, although the general rules may be few, their combinations may be endless. We have but twenty-six letters in the alphabet ; but who can enumerate the combinations into which they may be thrown ? If human comprehension cannot extend to this, how shall it reach the infinite variety, in which human actions, rights, duties, and responsibilities exhibit themselves ?

We might use another illustration. We every day see that an instrument, a deed, bond, or indenture of copartnership, between two individuals only, and having relation to such events as may arise between them in respect only to the particular subject of that contract, although it be drawn with the utmost care and sagacity, does not, nevertheless, expressly provide for cases which are found subsequently to arise between the parties ; and that the rights of the parties, notwithstanding all this skill and sagacity, must be ascertained and decided, in the end, by construction, analogy, and precedent. Now, if the greatest sagacity of learned and practical men cannot foresee and provide for cases arising between two individuals in relation to a single subject, what legislators may be expected to approach near enough to omniscience to foresee and provide for all cases, arising, on all subjects, among millions of men ?

To say, as some have said, that we have not a government of laws, because there is not a section in a statute for every man's case is making a false and groundless assertion. Besides, experience does not teach us, that legal subjects are always plain in proportion to the quantity of legislation bestowed upon them. Statutes themselves are often ambiguous and uncertain. A great part of the construction, so much complained of by these shallow thinkers, is the necessary construction of statutes. There are important branches of the law, resting almost entirely on precedents and decisions, and which are yet much more plain and certain than other branches, which are founded in a great number of statutes. The law of bills of exchange and promissory notes, for example, is a most extensive and important head of professional learning. It is, indeed, a system of most admirable utility, certain, complete, and uniform, to a degree of perfection approaching the end of all that human wisdom may be expected to reach. This system is not, however, raised on statutes, but on practice, precedent, equity, and construction. All the British legislation on this vast subject might almost be written on a single sheet. The law of bailment is another instance of the completeness, certainty, and excellence of the unwritten law. No British or American statute has a sentence on this subject, of such daily discussion and application. The doctrine which governs it was introduced into the English law, about the time of what may be called the commencement of the commercial era of the common law, by Lord Holt. He took it from that great and wonderful reservoir, the Roman law. Sir William Jones has expanded its principles, and run out the analysis, till the whole subject is exhibited with a certainty and precision almost mathematical. If any legislature should now undertake to legislate on this subject, would it benefit the community? Has it any better principles than are already established; or could it express them in a better manner, than is done by Sir John Holt and Sir William Jones?

The bankrupt laws, in England, are an instance of statute provisions. Being a positive institution of society, they must, of course, be founded in legislative enactment. Here, then, was a fair field for the exercise of that wisdom which is supposed

competent to prevent all disputes by the sagacity and accuracy of legislation. Yet there are no classes of questions which more occupy the judicial tribunals, than the cases in bankruptcy. And on this subject, statutes have been passed, amended, and accumulated. Defects have been remedied from time to time, by provisions proposed by gentlemen of the highest professional distinction, and who were much devoted to the subject of reformation in the laws. These did great good probably, but did not remove all doubts, nor prevent new cases; nor were their intelligent authors credulous enough to suppose they would have that effect. The reason is, the subject is vast, complicated, and intricate. When the most skilful legislation has done its best, new cases will still arise accompanied with doubt and difficulties, and these cases must be decided by recurrence to principles and the analogy of other cases.

Let it not be supposed that we intend in the slightest degree to underrate the value of legislation. Far from it. There are many improvements which can in no other way be effected. To legislate for a whole community is doubtless one of the highest functions in civil life. And we think it quite desirable in relation to ourselves in these times of quiet, that our legislatures should turn their attention to the improvement of the laws, and revise certain parts of our system, in the exercise of a sober, temperate, and cautious wisdom. But it must not be supposed, that, when this is done, even though it be done in the best manner possible, there will be no more room for doubts, nor any further use for reports, decisions, and adjudged cases. And here we would avail ourselves again of the opinion of an eminent and able man, whose name and authority we have already cited, and address to the legislatures, in our own country, the language which he, a few years since, addressed to the British Parliament. "Laws are serious things, and ought not to be adopted, merely upon the impulse of the moment. There has grown up in this country, of late years, a habit of far too great facility in the passing of laws. The immediate object only is looked to; some marked cases are selected, in which the intended operation of the laws coincides with the general feeling, but no account is taken of the numerous instances of individuals who would silently become its victims, and of the depre-

dations which it would make on the general happiness and security of the community."

It has sometimes been said, that while so many important questions are decided by construction and judicial opinion, and on precedent, we live, not under a government of laws, as we have boasted, but under a government of men. Quite the contrary is the truth of the case. In a government of laws, these various questions, for which the Legislature has not provided, and for which no legislature can provide, are to be decided, as other similar or analogous questions have been decided; so that what is law for one man shall be law for another. Such is a government of laws. But if precedent has no force, and analogy no influence; if the judge is at liberty to indulge his own discretion or inclination, in all cases to which no express statute applies, or in other words, in nine of ten of all the cases which come before him; if because A's right has been decided one way to-day, it does not follow that a similar right of B will be decided the same way to-morrow by another judge, then *men* govern, and rule us, and *not the law*.

In truth, the multitude of reported decisions in private causes, the eagerness with which they are read, and the respect paid to them by other tribunals, so far from being a proof of the barbarism of our times, or the dominion of men over us, are the highest evidence of our enlightened and civilized state, of the prevalence of correct opinions on the subject of jurisprudence, and of the fact, that questions of right and wrong are now decided, not by the vague discretion of the magistrate, but by law; that is, by a fixed rule, drawn from principles and analogy, and established by precedent. This is of the utmost value to private rights. It gives a security, a certainty, that the *law* will be administered, unless it be mistaken, by every tribunal that has a just sense of character. In these times, judges have become answerable, not only to parties and the power of the state, but to the tribunals of judicial and professional opinion. They cannot sin in defiance of the opinion of other judges and of the profession of the law;—at least they cannot, unless their minds are of the lowest order, and unless they feel responsibility only to the power that may deprive them of office, and to the sympathetic opinion of the vulgar.

Mr. Butler remarks, "That the very attempt to lessen, by legislative provisions, the bulk of the national law of any country, where arts, arms, and commerce flourish, must appear preposterous to a practical lawyer, who feels how much of the law of such a country is composed of received rules and received explanations. What could an act of the Imperial Parliament substitute in lieu of our received explanations of the rule in Shelley's case? The jurisprudence of a nation can only be essentially abridged by a judge's pronouncing a sentence which settles a contested point of law, on a legal subject of extensive application, as Lord Hardwicke did by his decree in the case of Willoughby against Willoughby; or by a writer's publishing a work on one or more important branches of the law, which, like the *Essay on Contingent Remainders*, has the unqualified approbation of all the profession." The same may be said of the judges in our own country. How many cases of great importance and frequent occurrence have been settled in this Commonwealth, and the rule of future cases established, since the commencement of Tyng's Reports. Every lawyer in the practice knows, that questions are daily settled without litigation, upon the opinion of counsel, which opinion is founded on cases already decided in our own courts.

Notwithstanding the vast utility of the reports of judicial decisions,—a point on which we think no men of reflection can differ,—it is, however, certain, that the rage for book-making has infected this, as well as other things, and that there is now, especially from the English press, somewhat of a redundancy of Reports. It arises, we think, from the growing habit of reporting cases not sufficiently important to merit publicity. This is a great and increasing evil, and unless checked may be deeply injurious to the profession and the public. It has not been so in former times. Nearly all the reported opinions of the King's Bench, during Lord Mansfield's time, are contained in Burrow, Cowper, Douglass, a few cases in Lofft, and the two first volumes of Term Reports. This extends over a period of thirty-two years. Lord Ellenborough has been on the Bench only since 1802; and yet more than twenty volumes of Reports from that court have appeared since he has presided in it. The consequence is just what would be expected.

Almost every case in Douglass, Cowper, and Burrow is a useful one. The latter volumes of the Term Reports, many of those of Mr. East, and of Maule and Selwyn, are filled with cases almost useless ; and in this country entirely so. It is our duty, as far as possible, to repress a similar redundancy in our own country. The profession is bound to interfere with its remonstrance, if the making of books of reports shall become a *trade*, and the profession be taxed, not for any useful purpose, but merely for the profit of the bookseller.

Of the Reports in this country, none certainly can be more important than those of the decisions of the Supreme Court of the United States. The great magnitude and variety of the questions that come before that court, render its judgments highly interesting. Their importance, we think, is daily increasing with the increasing questions of capture in time of war, and of revenue, at all times. These are, of themselves, almost equal to the entire occupation of the judges. In addition to these, however, there are questions of national law ; of the rights of foreigners ; questions of conflicting claims of States ; of the effect of state laws, and state decisions upon rights claimed under the United States, or on interests which are supposed to be put beyond the reach of state legislation by the Constitution of the United States.

We should naturally suppose, that questions of such an interesting nature, would render the sale of these reports very rapid. Such, however, has not heretofore been the fact. The number of law libraries, which contain a complete set of the Reports of the cases in the Supreme Court of the United States is comparatively small. A great portion of the profession do not ordinarily practice in the National Courts, and many content themselves with buying other books which to them are indispensable. Yet the importance of the decisions must render the volumes necessary, as well to those who follow their professional labors elsewhere, as to those who are practitioners in the National Courts. No gentleman can think he has a complete library, while he has not the judgments of the highest judicial tribunal in the country.

Mr. Wheaton commenced his labors, as a reporter, with no very flattering prospects, if we are to judge by the public

demand for the volumes of his predecessor. Congress, by a wise and well timed act, afforded him a temporary aid, sufficient, we hope, to introduce him to the profession; and we doubt not that his accuracy and ability will enable him to secure to himself the general patronage and support, both of the profession and the public.

The volume before us is the third in his series, and contains the decisions rendered at the last term of the court.

Many of these cases involve questions of great importance, and most of them, perhaps nearly all, are fit to be reported.

There are a few, which, we think, hardly contain anything so important as to render them worthy of the space they occupy. We doubt very much the utility of reporting cases which turn on mere matters of fact. It is true, indeed, that, in some such cases, judges take occasion to comment on the rules and principles of evidence, and when this happens the case very properly makes part of a volume of reports. But, where nothing is to be done but to weigh evidence, it is obvious that the occasion can furnish no rule for the government of subsequent cases. Such, we think, are the cases of the "New York, *Troup*, Claimant," and "The *Eolus*, *Wood*, Claimant." These are cases in which the judges differ in opinion about *facts*. They are not of a nature to be tried by a jury, and could not so be tried; but, we think, that such instances, occurring as well in our own courts as elsewhere, may teach us the importance of jury trials, as a general provision, used in the manner in which it is used in England, and the United States in civil causes. There can be no legal reasoning, until a particular state of facts is considered as settled. But there are cases, in which some doubts would always remain as to the facts connected with them, if a certain and precise issue were not joined between the parties, and a verdict, "importing absolute verity," found upon this issue. In many instances, this is much better done in a jury room than on the bench; for this reason, among others, *that the finding of the jury is not accompanied with the dissenting opinions*.

A strong impression against the use of juries in civil causes generally prevails in countries where the civil law is established. Yet there are reasons, at least plausible, for supposing

that something very analogous to English and American juries existed both in Athens and in Rome, in the better days of those republics. "I have always been of opinion," says Sir William Jones, "with the learned antiquary, Dr. Pettingal, that they (the judges at Athens) might with propriety be called jurymen; and that the Athenian juries differed from ours in very few particulars." Dr. Pettingal's "Inquiry into the use and practice of juries among the Greeks and Romans," deserves to be more read and better known. It is a book of accurate and extensive erudition, although written with somewhat too much acrimony against the civil law, as it existed after the time of Augustus.

Our advice, therefore, if we may offer it, is, that Mr. Wheaton omit, for the future, all cases turning merely upon evidence. We hope, too, that care will be taken to curtail the records, in cases where a full copy is not at all material. The author will see that nearly twenty pages might have been saved by abbreviating the formal parts of the record in the case of *Gelston v. Hoit*. It is not very pleasant to meet, in the pages of a volume of Reports, with full drawn demurrers, and joinders in demurrers, and to be introduced, in all due form, and by name, to the twelve worthy persons who compose the panel.

Having made these suggestions, which a man like Mr. Wheaton will know how to appreciate, we wish to express our high opinion of the general manner in which the reporter has executed his duty in the volume before us. Mr. Wheaton has not only recorded the decisions with accuracy, but has greatly added to the value of the volume by the extent and excellence of his notes. In this particular, his merits are, in a great degree, peculiar. No reporter in modern times, as far as we know, has inserted so much and so valuable matter of his own. These notes are not dry references to cases, — of no merit, but as they save the trouble of research, — but an enlightened adaptation to the case reported, of the principles and rules of other systems of jurisprudence, or a connected view of decisions on the principal points, after exhibiting the subject with great perspicuity, and in a manner to be highly useful to the reader. Mr. Wheaton's annotations evince a liberal and extensive acquaintance with his profession. His quotations from the treatises of the continental lawyers are numerous and well

selected. This is a branch of learning not much cultivated among us. Mr. Wheaton appears to have pursued it to some extent and to good purpose. It enables him to give a peculiar interest to his volume, nor is there a better mode in which he could communicate his own acquisitions of this sort to the profession, than by judicious and appropriate notes to reported cases.

Memorial to Congress on restraining the Increase of Slavery

DECEMBER 15, 1819.¹

THE Committee appointed by a vote of the Meeting holden in the State House on the 3d instant, to prepare a Memorial to Congress, on the subject of the Prohibition of Slavery in the New States, submit the following.²

THE undersigned, inhabitants of Boston and its vicinity, beg leave most respectfully and humbly to represent; That the question of the introduction of slavery into the new States, to be formed on the west side of the Mississippi River, appears to them to be a question of the last importance to the future welfare of the United States. If the progress of this great evil is ever to be arrested, it seems to the undersigned that this is the time to arrest it. A false step taken now cannot be retraced; and it appears to us that the happiness of unborn millions rests on the measures, which Congress may, on this occasion, adopt. Considering this as no local question, nor a question to be decided by a temporary expediency, but as involving great interests of the whole of the United States, and affecting deeply and essentially those objects of common defence, general welfare, and the perpetuation of the blessings of liberty, for which the Constitution itself was formed, we have presumed, in this way, to offer our sentiments and express our wishes to the National Legislature.

¹ "A Memorial to the Congress of the United States, on the Subject of Restraining the Increase of Slavery in New States to be admitted into the Union. Prepared in pursuance of a vote of the Inhabitants of Boston and its Vicinity assembled at the State House on the Third of December, A.D., 1819. Boston, Sewell Phelps, Printer, No. 5 Court Street, 1819."

² The Committee consisted of Daniel Webster, George Blake, Josiah Quincy, James T. Austin, and John Gallison.

And as various reasons have been suggested, against prohibiting slavery in the new States, it may perhaps be permitted to us to state our reasons, both for believing that Congress possesses the constitutional power to make such prohibition a condition, on the admission of a new State into the Union, and that it is just and proper that they should exercise that power.

And, in the first place, as to the constitutional authority of Congress. The Constitution of the United States has declared, that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice the claims of the United States, or of any particular State." It is very well known that the saving in this clause of the claims of any particular State was designed to apply to claims by the then existing States of territory, which was also claimed by the United States as their own property. It has, therefore, no bearing on the present question. The power, then, of Congress over its own territories is, by the very terms of the Constitution, unlimited. It may make all "needful rules and regulations;" which of course include all such regulations as its own views of policy or expediency shall from time to time dictate. If, therefore, in its judgment, it be needful for the benefit of a Territory to enact a prohibition of slavery, it would seem to be as much within its power of legislation, as any other ordinary act of local policy. Its sovereignty being complete and universal, as to the Territory, it may exercise over it the most ample jurisdiction in every respect. It possesses in this view all the authority which any State Legislature possesses over its own territory; and if a State Legislature may, in its discretion, abolish or prohibit slavery within its own limits, in virtue of its general legislative authority, for the same reason Congress also may exercise the like authority over its own Territories. And that a State Legislature, unless restrained by some constitutional provision, may so do, is unquestionable, and has been established by general practice.

If, then, Congress possess unlimited powers of government

over its Territories, it may certainly from time to time vary, control, and modify its legislation as it pleases. The Territories, as such, can have no rights but such as are conferred by Congress; and it is morally bound to adopt such measures as are best calculated to promote the permanent interests and security of these Territories, as well as to secure the future well-being of the Union. Without an enabling act of Congress, no Territory or portion of Territory belonging to the United States can be created into a State, or form a constitution of government, or become discharged of its territorial obedience; and if Congress may grant to any of its Territories this privilege, it may also most clearly, as it seems to us, in its discretion, refuse it. It is not obliged to admit it to become a State, if it be not satisfied that such admission will conduce as well to its own good as to the good of the Union. In this respect Congress stands, in relation to its Territories, like a State in relation to any portion of its own territory which requests to be separated and formed into a new State. No person has ever doubted that the question as to such separation was a question of expediency, resting in the sound discretion of the State; and that it could not be claimed as matter of right, unless in virtue of some compact, establishing such right. No person has ever doubted that any State, in acceding to a division of its territory, and the formation of a new State, has always possessed the right to impose its own terms and conditions as a part of the grant. The ground of this right is the exclusive possession of sovereignty, with which the State is not compellable to part, and if it does part with it, it may annex all such conditions and rules as it deems fit for its own security and for the permanent good of the citizens of the divided territory. Such was the case of Virginia, when she acceded to the separation of the District of Kentucky, and allowed it to become an independent State. Such is the case of the recent separation of the District of Maine from Massachusetts. In each of these cases, a considerable number of fundamental conditions were offered to the districts as the sole grounds upon which the separation could be allowed; and not a doubt was ever entertained, that these conditions were within the legitimate exercise and authority of

these States. These conditions were accepted by Kentucky, and have been accepted by Maine ; and it was never imagined, that they in any respect prevented either from possessing all the proper attributes of State sovereignty. They have never been viewed in any other light than as just restrictions, not upon essential state rights, but upon an unlimited exercise of sovereignty, which might be injurious to rights already vested in the parent State, or its citizens. And if Virginia and Massachusetts may, by virtue of their sovereign rights, impose conditions upon their grants of their own territorial jurisdiction ; for the same reason, it would seem, the United States may impose any like conditions, according to their own sound discretion. And a construction of this clause of the Constitution of the United States, which should inhibit Congress from annexing conditions to the act enabling any Territory to form a State government, because it would impair the sovereignty of the State so formed, would equally affect the like conditions annexed by a State to a like act in favor of a portion of its own territory. A construction, which would lead to such consequences, cannot be a sound one. It would lead to the most injurious results, and absolve all the new States, which have been admitted into the Union since the year 1791, from conditions which have hitherto been held to be inviolably binding upon them. It would also be repugnant to the comprehensive language of this clause of the Constitution, and to the uniform practice which has prevailed under it from the earliest period of the formation of new States to the present time. No State has ever admitted a new State to be formed in its own bosom without annexing conditions, and no act has passed Congress enabling any of its Territories to become States, which has not, in like manner, annexed important fundamental conditions to the act. And if conditions may be annexed, it depends solely upon the wisdom of Congress what such conditions shall be. They may embrace everything not incompatible with the possession of those federal rights which an admission into the Union confers upon the new State. As to such rights, there must, by the very nature of the case, be an implied exception. The remarks, that have hitherto been made, have proceeded upon the supposition

that Congress are not morally bound, either by the Treaty of Cession, or by any compact with the inhabitants, to pass an act for the erection of the new State, without imposing conditions.

These observations, so far, have been confined to the constitutional authority of Congress flowing directly from the clause which has been mentioned. Here, then, is the case of an express power given in plain terms; and by another clause of the Constitution, Congress have express authority "to make all laws necessary and proper for carrying that power into execution." But other clauses may well be called in aid of this construction, applicable to all cases whatsoever in which a new State seeks to be admitted into the Union. The Constitution provides that "new States may be admitted into the Union." The only parties to the Constitution, contemplated by it originally, were the thirteen confederated States. It was perceived that the territory, already included within these States, might be beneficially divided and organized under separate governments, and that the Territories already belonging to the United States might, and in good faith ought, to participate in the privileges of the federal Union. It was therefore wisely provided that Congress, in which all the old States were represented, should have authority to admit new States into the Union, whenever in its judgment such an act would be beneficial to the public interests. But it was at the same time provided that no new State should be formed or erected within the jurisdiction of any other State, etc., without the consent of the Legislatures of the States concerned, as well as of the Congress. It is observable, that the language of the Constitution is, that new States may (not shall) be admitted into the Union. It is, therefore, a privilege which Congress may withhold or grant, according to its discretion. If it may give its consent, it may also refuse it, and no new State can have a right to compel Congress to do that which, in its judgment, is not fit to be done. If Congress have authority to withhold its consent, it has also authority to give that consent, either absolutely, or upon condition; for there is nothing in the Constitution which restricts the manner or the terms of that consent. It is observable, too, that where a new State is to be erected within the limits of an

old State, the consent of the State Legislature is as necessary as that of Congress. Now it will not, we suppose, be contended, that the State Legislature may not grant its consent upon condition; and, if so, Congress must have the same right also, for the consent of the State Legislatures and of Congress is required by the same clause, and the construction which fixes the meaning of "consent" as to the one, must, in order to maintain consistency, fix it as to the other. And here it might be again asked, if the conditions of Virginia, annexed to her consent that Kentucky should become a State, were not binding upon the latter, and upon Congress? It appears to the memorialists perfectly clear, that since Congress has a discretionary authority as to the admission of new States into the Union, it may impose whatever conditions it pleases as terms of that consent; and that this clause, alone, which applies as well to new States formed from old States, as to those formed from the Territories of the Union, completely establishes the right, for which the memorialists contend.

The creation of a new State is, in effect, a compact between Congress and the inhabitants of the proposed State. Congress would not probably claim the power of compelling the inhabitants of Missouri to form a Constitution of their own, and come into the Union as a State. It is as plain, that the inhabitants of that Territory have no right to admission into the Union, as a State, without the consent of Congress. Neither party is bound to form this connection. It can be formed only by the consent of both. What, then, prevents Congress, as one of the stipulating parties, to propose its terms? And if the other party assents to these terms, why do they not effectually bind both parties? Or if the inhabitants of the Territory do not choose to accept the proposed terms, but prefer to remain under a territorial government, has Congress deprived them of any right, or subjected them to any restraint, which, in its discretion, it had not authority to do? If the admission of new States be not the discretionary exercise of a constitutional power, but, in all cases, an imperative duty, how is it to be performed? If the Constitution means that Congress shall admit new States, does it mean that Congress shall do this on every application, and under all circumstances?

Or, if this construction cannot be admitted, and if it must be conceded that Congress must, in some respects, exercise its discretion, on the admission of new States, how is it to be shown that that discretion may not be exercised, in regard to this subject, as well as in regard to others?

The Constitution declares, "that the migration or importation of such persons as any of the States, now existing, shall think proper to admit, shall not be prohibited by the Congress, prior to the year 1808." It is most manifest that the Constitution does contemplate, in the very terms of this clause, that Congress possess the authority to prohibit the migration or importation of slaves; for it limits the exercise of this authority for a specific period of time, leaving it to its full operation ever afterwards. And this power seems necessarily included in the authority, which belongs to Congress, "to regulate commerce with foreign nations and among the several States." No person has ever doubted that the prohibition of the foreign slave trade was completely within the authority of Congress since the year 1808. And why? Certainly only because it is embraced in the regulation of foreign commerce: and if so, it may for the like reason be prohibited, since that period, between the States. Commerce in slaves since the year 1808, being as much subject to the regulation of Congress as any other commerce, if it should see fit to enact that no slave should ever be sold from one State to another, it is not perceived how its constitutional right to make such provision could be questioned. It would seem to be too plain to be questioned, that Congress did possess the power, before the year 1808, to prohibit the migration or importation of slaves into its Territories (and in point of fact it exercised that power), as well as into any new States; and that its authority, after that year, might be as fully exercised to prevent the migration or importation of slaves into any of the old States. And if it may prohibit new States from importing slaves, it may surely, as we humbly submit, make it a condition of the admission of such States into the Union, that they shall never import them. In relation, too, to its own Territories, Congress possesses a more extensive authority, and may, in various other ways, effect the same object. It might, for

example, make it an express condition of its grants of the soil, that the owners shall never hold slaves; and thus prevent the possession of slaves from ever being connected with the ownership of the soil.

As corroborative of the views, which have been already suggested, the memorialists would respectfully call the attention of Congress to the history of the national legislation, under the confederation as well as under the present Constitution, on this interesting subject. Unless the memorialists greatly mistake, it will demonstrate the sense of the nation at every period of its legislation to have been, that the prohibition of slavery was no infringement of any just rights belonging to free States, and was not incompatible with the enjoyment of all the rights and immunities which an admission into the Union was supposed to confer.

It will be recollected that Congress, by a resolve of the 10th of October, 1780, declared that the unappropriated lands that might be ceded to the United States, pursuant to a previous recommendation of Congress, should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the federal Union and have the same rights of sovereignty, freedom, and independence as the other States. This language is exceedingly strong, and guarantees to the new States the same rights of sovereignty as the old States possessed. It was undoubtedly with this resolve in view, that the territory northwest of the Ohio was ultimately ceded to the United States by the several States claiming title to it; viz., by Massachusetts, Connecticut, New York, and Virginia. New York made a cession on the 1st of March, 1781, without annexing any condition; Virginia, on the 1st of March, 1784, upon certain conditions, and, among others, a condition embracing the substance of the resolve of the 10th of October, 1780. Massachusetts made a cession on the 19th of April, 1785, stating no conditions, but expressly to the uses stated in the resolve of 1780. And lastly, Connecticut made a cession on the 13th of September, 1786, without any condition, but expressly for the common use and benefit of the United States. On the 13th of July, 1787, Congress passed

an ordinance for the government of the territory so added, which has ever since continued in force, and has formed the basis of the territorial governments of the United States. This ordinance was passed by the unanimous voice of all the States present at its passage; viz., Massachusetts, New York, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, and Georgia. It contains six fundamental articles as a compact between the United States and the inhabitants who might occupy that Territory, which are introduced by a preamble, declaring them to be "for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are created; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in said Territory; to provide also for the establishment of States and a government therein, and for their admission into a share *in the federal councils, on an equal footing with the original States*, at as early a period as might be consistent with the general interest." The 6th article declares, that "there shall neither be slavery nor involuntary servitude in the said territory, otherwise than for the punishment of crimes, whereof the party shall become convicted." It is observable, that no objection occurred to this article, on the ground that it was incompatible with the equal sovereignty, freedom, and independence with the original States, to which the new States, to be formed in the ceded Territory, were entitled, by the resolve of the 10th of October, 1780, and by the express reference to that resolve, in the conditions of some of the cessions. It is observable, also, that by the preamble already recited, to which all the States present acceded, and among these were three of the ceding States, and a majority of the slave-holding States, it was expressly admitted that the restrictions of the 6th article would not deprive the new States, upon their admission into the federal councils, of their equal footing with the original States. This is a high legislative construction, by independent States, acting in their sovereign capacity, and entitled to the greater weight because it was a subject of common interest; and to all it could not but be deemed

a precedent which would justly influence the subsequent measures of the general Government. Since the adoption of the Constitution, three new States, forming a part of this territory, viz., Ohio, Indiana, and Illinois, have been admitted into the Union. In the acts enabling them to form State governments and a State constitution, Congress has, among other very important conditions, made it a fundamental condition that their constitutions should contain nothing repugnant to the ordinance of 1787. These conditions were acceded to by these States, and have ever been deemed obligatory upon them and inviolable; and these States, notwithstanding these conditions, are universally considered as admitted into the Union upon the same footing as the original States, and as possessing, in respect to the Union, the same rights of sovereignty, freedom, and independence as the other States, in the sense in which those terms are used in the resolve of 1780. During a period of thirty years, not a doubt has been suggested that the provisions of this ordinance were perfectly compatible with the implied and express conditions of the cessions of this territory; and that Congress might justly impose the conditions which it contains upon all the States formed within its limits.

In the year 1791, Vermont was admitted into the Union, without any condition being annexed respecting slavery. The reason was obvious. It had already formed a constitution which excluded slavery; and it may be also asserted, that, looking to the habits and feelings of its population, and the habits and feelings and constitutional provisions of neighboring States, it was morally impossible that slavery could be adopted in that State.

Kentucky was admitted into the Union in June, 1792. The State was formed from the State of Virginia, and the latter, in granting its consent, imposed certain conditions, which have since been supposed to form a fundamental compact, which neither is at liberty to violate. Congress did not impose any restrictions as to slavery on its admission, and for reasons which cannot escape the most careless observer. It would have been manifestly unjust, as well as impolitic.

Tennessee was admitted into the Union in June, 1796. It

was ceded by North Carolina, more than six years before, as a Territory, upon certain conditions, and among them that Congress should assume the government of the Territory, and govern it according to the ordinance of 1787; with a proviso, however, "that no regulation made or to be made by Congress shall tend to emancipate slaves." In good faith, therefore, Congress could not justly insist upon a prohibition of slavery upon its admission into the Union.

Mississippi was admitted into the Union in December, 1817, upon condition that its constitution should contain nothing repugnant to the ordinance of 1787; so far as the same had been extended to the Territory by the agreement of cession made between the United States and Georgia; and Alabama was authorized to become a State by the act of 2d of March, 1819, upon a similar condition. Both of these States were ceded as one Territory to the United States by Georgia in April, 1802, upon condition, among other things, that it should be admitted into the Union in the same manner as the Territory northwest of the Ohio might be under the ordinance of 1787; "which ordinance (it is declared) shall extend to the territory contained in the present act of cession, *that article only excepted which forbids slavery.*" The prohibition of slavery could not, therefore, without the grossest breach of faith, be applied to this Territory. And the very circumstance of this exception in this cession of Georgia, as well as in that of North Carolina, shows strongly the sense of those States that, without such an exception, Congress would possess the authority in question.

The memorialists, after this general survey, would respectfully ask the attention of Congress to the state of the question of the right of Congress to prohibit slavery in that part of the former territory of Louisiana, which now forms the Missouri Territory. Louisiana was purchased of France by the Treaty of the 30th of April, 1803. The third article of that Treaty is as follows: "The inhabitants of the ceded Territory shall be incorporated into the Union of the United States, and admitted as soon as possible, *according to the principles of the federal Constitution*, to the enjoyment of all the *rights, advantages, and immunities of citizens of the United States*; and in

the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Although the language of this article is not very precise or accurate, the memorialists conceive that its real import and intent cannot be mistaken. The first clause provides for the admission of the ceded Territory into the Union, and the succeeding clause shows this must be according to the principles of the federal Constitution; and this very qualification necessarily excludes the idea that Congress were not to be at liberty to impose any conditions upon such admission which were consistent with the principles of that Constitution, and which had been or might justly be applied to other new States. The language is not by any means so pointed as that of the resolve of 1780: and yet it has been seen that that resolve was never supposed to inhibit the authority of Congress, as to the introduction of slavery. And it is clear, upon the plainest rules of construction, that in the absence of all restrictive language, a clause, merely providing for the admission of a Territory into the Union, must be construed to authorize an admission in the manner, and upon the terms, which the Constitution itself would justify. This construction derives additional support from the next clause. The inhabitants "shall be admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the *rights, advantages, and immunities of citizens of the United States.*" The rights, advantages, and immunities here spoken of must, from the very force of the terms of the clause, be such as are recognized or communicated by the Constitution of the United States; such as are common to all citizens, and are uniform throughout the United States. The clause cannot be referred to rights, advantages, and immunities derived exclusively from the State governments, for these do not depend upon the federal Constitution. Besides, it would be impossible that all the rights, advantages, and immunities of citizens of the different States could be at the same time enjoyed by the same persons. These rights are different in different States; a right exists in one State which is denied in others, or is repugnant to other rights

enjoyed in others. In some of the States, a freeholder alone is entitled to vote in elections; in some, a qualification of personal property is sufficient; and in others, age and freedom are the sole qualifications of electors. In some States, no citizen is permitted to hold slaves; in others, he possesses that power absolutely; in others, it is limited. The obvious meaning, therefore, of the clause is, that the rights derived under the federal Constitution shall be enjoyed by the inhabitants of Louisiana in the same manner as by the citizens of other States. The United States, by the Constitution, are bound to guarantee to every State in the Union a republican form of government; and the inhabitants of Louisiana are entitled, when a State, to this guarantee. Each State has a right to two senators, and to representatives according to a certain enumeration of population pointed out in the Constitution. The inhabitants of Louisiana, upon their admission into the Union, are also entitled to these privileges. The Constitution further declares "that the citizens of each State shall be entitled to all the privileges and immunities of citizens *in* the several States." It would seem as if the meaning of this clause could not well be misinterpreted. It obviously applies to the case of the removal of a citizen of one State to another State; and in such a case it secures to the migrating citizen all the privileges and immunities of citizens *in* the State to which he removes. It cannot surely be contended, upon any rational interpretation, that it gives to the citizens of each State all the privileges and immunities of the citizens of every other State, at the same time and under all circumstances. Such a construction would lead to the most extraordinary consequences. It would at once destroy all the fundamental limitations of the State constitutions upon the rights of their own citizens; and leave all those rights at the mercy of the citizens of any other State which should adopt different limitations. According to this construction, if all the State constitutions save one prohibited slavery, it would be in the power of that single State, by the admission of the right of its citizens to hold slaves, to communicate the same right to the citizens of all the other States within their own exclusive limits, in defiance of

their own constitutional prohibitions; and to render the absurdity still more apparent, the same construction would communicate the most opposite and irreconcilable rights to the citizens of different States at the same time. It seems, therefore, to be undeniable, upon any rational interpretation, that this clause of the Constitution communicated no rights in any State which its own citizens do not enjoy; and that the citizens of Louisiana, upon their admission into the Union, in receiving the benefit of this clause, would not enjoy higher or more extensive rights than the citizens of Ohio. It would communicate to the former no right of holding slaves, except in States where the citizens already possessed the same right under their own State constitutions and laws.

The Treaty, then, by providing for the inhabitants of Louisiana the enjoyment of all the rights, advantages, and immunities of citizens of the United States, seems distinctly to have pointed to those derived from the federal Constitution, and not to those which, being derived from other sources, were enjoyed by some and denied to others of the citizens of the United States.

The remaining clause of the Treaty, "that in the mean time" the inhabitants "shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess," requires no examination. It manifestly applies to the period of its territorial government, and has no reference to the terms of its admission into the Union, or to the condition of the Territory after it becomes a State. But it may be confidently asked whether, if the whole ordinance of 1787, which contains the prohibition of slavery, had been extended to Louisiana, there would have been anything inconsistent with the enjoyment of liberty, property, or religion? So far as slaves are deemed property, it might be just that the then real owners within the Territory should be secured in the enjoyment of that property; but the permission to acquire such property in future, like every other right of property, ought to depend upon sound legislation, and be granted or denied by Congress, as its own judgment should direct. And the memorialists cannot perceive, in this clause of the Treaty, any restriction upon

the right of Congress to exercise the utmost freedom of legislation as to the future introduction of slaves into the ceded Territory.

Congress, after this cession, divided the Territory into two territorial governments ; and by an act passed on the 2d of March, 1805, in the exercise of its legislative discretion, directed that the Orleans Territory (which has since become the State of Louisiana) should be governed by the ordinance of 1787, excepting as to the descent and distribution of estates, and the article respecting slavery. By a subsequent act of the 11th of April, 1811, authorizing the inhabitants of this Territory to become a State, Congress annexed several highly important conditions to the exercise of this high act of sovereignty. Among other conditions, it required that the River Mississippi, and the waters thereof, should be highways, and remain forever free to all the inhabitants of the United States and its Territories, without any tax, toll, or impost laid by the State therefor ; that the constitution should contain the fundamental principles of civil and religious liberty, and should allow the trial by jury in criminal cases, and the privilege of the writ of habeas corpus ; that all the laws, records, and judicial proceedings of the State, judicial and legislative, should be in the language in which the laws of the United States are written ; that the people should disclaim all right to the unappropriated territory within the limits of the State, and that the same should be at the disposal of the United States ; that lands sold by the United States should be exempt from taxation for five years from the sale ; and that lands of non-residents should not be taxed higher than those of residents. These conditions are certainly very striking limitations of sovereignty, and embrace most of the fundamental regulations of the ordinance of 1787, excepting the article touching slavery. It is not known to the memorialists that any doubt of their constitutionality, or of their perfect harmony with the Treaty of 1803, was ever entertained, either in Congress or in Louisiana ; and yet they contained some principles as repugnant to the original jurisprudence of the Territory, at the time of its cession, as could well be devised ; and if Congress could then impose such conditions,

what reason is there to say that it may not now impose the same conditions on the Missouri Territory? and if such conditions, why not any others which its wisdom, its justice, or its policy may dictate?

Upon the whole, the memorialists would most respectfully submit that the terms of the Constitution, as well as the practice of the governments under it, must, as they humbly conceive, entirely justify the conclusion, that Congress may prohibit the further introduction of slavery into its own Territories, and also make such prohibition a condition of the admission of any new State into the Union.

If the constitutional power of Congress to make the proposed prohibition be satisfactorily shown, the justice and policy of such prohibition seem to the undersigned to be supported by plain and strong reasons. The permission of slavery in a new State necessarily draws after it an extension of that inequality of representation which already exists in regard to the original States. It cannot be expected that those of the original States which do not hold slaves can look on such an extension as being politically just. As between the original States, the representation rests on compact and plighted faith; and your memorialists have no wish that that compact should be disturbed, or that plighted faith in the slightest degree violated. But the subject assumes an entirely different character when a new State proposes to be admitted. With her there is no compact, and no faith plighted; and where is the reason that she should come into the Union with more than an equal share of political importance and political power? Already the ratio of representation, established by the Constitution, has given to the States holding slaves twenty members in the House of Representatives more than they would have been entitled to, except under the particular provision of the Constitution. In all probability, this number will be doubled in thirty years. Under these circumstances, we deem it not an unreasonable expectation that the inhabitants of Missouri should propose to come into the Union, renouncing the right in question, and establishing a constitution prohibiting it forever. Without dwelling on this topic, we have still thought it our duty to present it to the consideration of Con-

gress. We present it with a deep and earnest feeling of its importance, and we respectfully solicit for it the full consideration of the National Legislature.

Your memorialists were not without the hope that the time had at length arrived when the inconvenience and the danger of this description of population had become apparent in all parts of this country, and in all parts of the civilized world. It might have been hoped that the new States themselves would have had such a view of their own permanent interests and prosperity, as would have led them to prohibit its extension and increase. The wonderful increase and prosperity of the States north of the Ohio is unquestionably to be ascribed in a great measure to the consequences of the ordinance of 1787; and few, indeed, are the occasions, in the history of nations, in which so much can be done by a single act, for the benefit of future generations, as was done by that ordinance, and as may now be done by the Congress of the United States. We appeal to the justice and the wisdom of the national councils to prevent the further progress of a great and serious evil. We appeal to those who look forward to the remote consequences of their measures, and who cannot balance a temporary or trifling convenience, if there were such, against a permanent, growing, and desolating evil.

We cannot forbear to remind the two Houses of Congress that the early and decisive measures adopted by the American Government for the abolition of the slave trade are among the proudest memorials of our nation's glory. That slavery was ever tolerated in the republic is, as yet, to be attributed to the policy of another government. No imputation, thus far, rests on any portion of the American Confederacy. The Missouri Territory is a new country. If its extensive and fertile fields shall be opened as a market for slaves, the Government will seem to become a party to a traffic which, in so many acts, through so many years, it has denounced as impolitic, unchristian, inhuman. To enact laws to punish the traffic, and at the same time to tempt cupidity and avarice by the allurements of an insatiable market, is inconsistent and irreconcilable. Government, by such a course, would only defeat its own purposes, and render nugatory its own meas-

ures. Nor can the laws derive support from the manners of the people, if the power of moral sentiment be weakened by enjoying, under the permission of Government, great facilities to commit offences. The laws of the United States have denounced heavy penalties against the traffic in slaves, because such traffic is deemed unjust and inhuman. We appeal to the spirit of these laws; we appeal to this justice and humanity. We ask whether they ought not to operate, on the present occasion, with all their force? We have a strong feeling of the injustice of any toleration of slavery. Circumstances have entailed it on a portion of our community which cannot be immediately relieved from it without consequences more injurious than the suffering of the evil. But to permit it in a new country, where yet no habits are formed which render it indispensable, what is it, but to encourage that rapacity, fraud, and violence against which we have so long pointed the denunciations of our penal code? What is it, but to tarnish the proud fame of the country? What is it, but to throw suspicion on its good faith, and to render questionable all its professions of regard for the rights of humanity and the liberties of mankind?

As inhabitants of a free country, as citizens of a great and rising republic, as members of a Christian community, as living in a liberal and enlightened age, and as feeling ourselves called upon by the dictates of religion and humanity,—we have presumed to offer our sentiments to Congress on this question, with a solicitude for the event far beyond what a common occasion could inspire.

NOTE.

Mr. Webster's speech at the meeting of December 3, 1819, was not printed in the newspaper reports, but it probably was afterwards used in the preparation of the Memorial. The *Columbian Centinel* of December 4 said that "he gave an historical sketch of the whole subject, pointed out the constitutionality of the measure, and in a brief peroration advocated its expediency with his usual force and precision." The *Boston Daily Advertiser* of the same date said that Mr. Webster "concurred with Mr. Blake in his views of the Constitutional question, which he further illustrated by an historical view of the admission of several States into the Union since the adoption of the Constitution, and showed incontrovertibly, both by negative and positive examples, that Congress had

this power, and that they were called upon by all the principles of sound policy, humanity, and morality to exact it, and by prohibiting slavery in the new State of Missouri, oppose a barrier to the further progress of slavery, which else, and this was the last time the opportunity would happen to fix its limits, would roll on desolating the vast expanse of continent to the Pacific Ocean."

The exact authorship of the Memorial cannot be ascertained. There is a copy of the pamphlet in the Massachusetts Historical Society which belonged to Mr. George Ticknor and which bears the written note "prepared by Jno. Gallison." The handwriting is thought to be Mr. Ticknor's. (See "Massachusetts Historical Society Proceedings," 2d Series, Vol. VII. page 119.) On the other hand, Rev. Edward Everett Hale has a copy of the pamphlet, and on its titlepage is the memorandum "Written by Austin and Webster." The handwriting is that of Dr. Hale's father, Nathan Hale, Editor of the Boston Daily Advertiser when the Memorial was prepared. It should also be noted that Mr. Webster headed the Committee and that much of the Memorial corresponds to the resumé of his remarks as presented in the Advertiser report of the meeting.

On December 27, 1819, Mr. Webster sent a copy of the Memorial to Rufus King, and said in a letter, "We have added little or nothing in this Memorial to the view taken by you; and yet we thought it might be well to state the argument over again, in the hope that some might read it in this shape, who might not see it, better stated, in your admirable speeches." Hon. Henry Wilson in his "Rise and Fall of the Slave Power in America" (Vol. I. p. 150) refers to the pamphlet as "this memorial drawn up by Mr. Webster."

The Law of Creditor and Debtor

NORTH AMERICAN REVIEW, July, 1820.

Examination of some Remarks in the Quarterly Review on the Laws of Creditor and Debtor in the United States.

THE Quarterly Review for May, 1819, contained two articles concerning the United States; one a review of Fearon's* book of travels, and the other a review of Mr. Bristed's book upon the resources of America. The Quarterly Review is, as everybody knows, extensively circulated and much read in this country; and these articles excited, at the time of their appearance, no small degree of attention. It would be difficult, we imagine, in the same number of pages, to crowd more misrepresentation, or betray more ignorance, than appears in these articles, especially that which we have first mentioned. To the common vaporings of the English presses we pay little attention. These oracles are no more to be regarded, in their vituperations of the government and people of this country, than similar oracles among ourselves in *their* abuse of the government and people of England. The leaders of such assemblages as the Manchester mob, and the orators in the palace-yard, find it convenient to inflame the passions of their auditors by declaiming, in terms of high panegyric, of the condition of America; wisely contriving, by a sort of contrast, to breed discontent, and to sharpen the feeling of hatred towards their own government. Other speakers and other writers, finding or thinking it necessary to refute these representations, naturally enough run into opposite extremes, and

* The last that we have heard of this *author* is, that some time last winter a criminal information was moved for against him, in the King's Bench, for a conspiracy to produce a riot, at the election of the Lord Mayor.

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set off their own condemnation and abuse of America against the extravagant encomiums of their adversaries. All this is in the course of things. It is no more than must always be expected in a country with such a government as that of England; and it is of no consequence to us, what is the issue of this little and low strife of temporary politics. We suffer about equally by the commendation of one party and the abuse of the other; and we ought to be regardless of both.

But different, far different, is the case, when a work of established reputation in the literary world professes to discuss our character and condition. When gentlemen and scholars undertake to write about us, we have more interest in what they say, and are less disposed to acquiesce in misrepresentation and injustice. The writers of the articles in question seem to have considered themselves as speaking *about* America, but not *to* America. They do not take the United States into the account of those who are to read their works, and judge of them. They do not look at the reading and thinking men on this side the Atlantic, as forming any part of that great tribunal of the public to which they acknowledge a responsibility. In this respect, in our humble judgment, they commit an oversight. English scholars, English editors, and English politicians have heretofore felt an unconquerable reluctance to admit the people of this country to a participation of those honors which belong to the civilized world, and the great family of Christian communities. They have been unwilling to see that North America has ceased to be a colony; and still desire to regard her, so far as respects acquirements, talents, and character, like Jamaica, Malta, or the Cape of Good Hope. This attempt, we may be allowed to say, will not succeed. America is entitled to her place among the nations, and nothing can keep her from it. It is in nature, as it appears to be in the purpose of Providence, that a people shall, within a short period of time, exist on this side of the ocean, speaking the English language, springing principally from English origin, adopting English laws, and possessing the invaluable blessings of English institutions, so numerous, that the amount of British population, added or subtracted, would hardly make a sensible difference. Already the United

States contain as many people as England, and among them there is, if not as full, yet as respectable a proportion belonging to the reading class. Whatever appears in England, and attracts attention there, in the departments of science, literature, poetry, or politics, appears here also, thirty days afterwards, with uniform regularity. We receive these reviews wet from the press, and read and reprint and circulate them. We venture to say, that in no part of the island of Great Britain, London excepted, is reading so general among the population, as in New England. Having thus, as we believe we have, in the United States, a larger reading community than either Scotland or Ireland, how is it that America is not to compose a part, and an important part, of that public before which a scientific and literary journal, composed and published in the English language, is to stand in judgment? We would modestly, but firmly, insist on this reasonable participation in the authority and dignity of public opinion. We hold the right, and mean both to exercise and to defend it, of having and of expressing opinions on subjects of science and literature, and respecting those who discuss these subjects.

It is a natural prejudice that an old country should be unwilling to admit a young one upon any terms of equality. England herself is not thought old enough, nor respectable enough, to assume the port and bearing of an equal in the celestial empire of China; and there are elsewhere, as well as at Pekin, a dislike and scorn for the *novi homines*. English politicians and English scholars entertain towards us, when we press for admittance into their society and fellowship, something like that feeling, at once scornful and jealous, with which the Earl of Wharton addressed the twelve new peers in the reign of Queen Anne. Yet this prejudice and this reluctance must give way; this scorn must be subdued, and this jealousy, if it be not, as it ought to be, eradicated, must become silent.

We of the United States have numbers and power and wealth, and a growing commerce, and a most extensive country, and, as we may think without vanity, some portion of that intelligence and spirit which belongs to our more cultivated neighbors. Once for all, then, if we can express ourselves in such a manner as not to incur the imputation of

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arrogance, we wish to say, that we consider ourselves as forming a part, and a respectable part, of the great public of civilized and Christian nations, having an interest in such subjects discussed before that public as are not in themselves local or peculiar; with a good right of contribution, as far as our ability admits, to those discussions ourselves; and above all a right to fair dealing and gentlemanly treatment from all who profess to write for the good of this public, and to be answerable to its judgment.

We put forth this claim in behalf of our country, and in behalf of the informed and reading class of its citizens. It is for the English writers to say, not whether it shall be admitted,—that question we do not refer to their arbitrament,—but whether, on their part, it shall be admitted freely, and with courtesy, or with hesitation, reluctance, ill nature, and ill manners.

We have space at present to take notice of one only of the topics discussed in these articles. It relates to the American law of creditor and debtor, about which the reviewer has published extracts from Mr. Bristed's book, with comments. Mr. Bristed is an Englishman, by birth and education. He has lived, as it appears, for some time in the city of New York, and has published a book upon the resources of this country. Some observations were made on that work in a former number of this journal. Referring to these observations, we have now only to say of Mr. Bristed's general character, as an authority, that he is beyond ordinary measure destitute of all accuracy and precision. There are, of course, many important facts collected in this book, and a mass of extracts from public documents, in some degree useful, perhaps to those who do not possess the same matter in a better form; but his own opinions, and inferences, and observations upon manners, are not to be received but with great allowance. Mr. Bristed never speaks with any qualification. He has little general, and no intimate knowledge of the state of things in this country, and he speaks only from what lies within his own immediate and confined observation. With him all peculiarities are general truths, and all exceptions become rules. We have hardly patience with a man who could write

such a paragraph as the first quoted from his book in the article in the *Quarterly Review*, which we beg leave to transcribe again, and to proceed to make some remarks upon it.

“The laws of this country generally favor the debtor at the expense of the creditor, and so far encourage dishonesty. The number of insolvents in every State is prodigious, and continually increasing. They very seldom pay any part of their debts, but get discharged by the state insolvent acts with great facility, secrete what property they please for their own use, without the creditor’s being able to touch a single stiver. There is no bankrupt law in the United States, and no appeal in these matters to the Federal courts; whence in every State the insolvent acts operate as a general jail delivery of all debtors, and a permanent scheme by which creditors are defrauded of their property. The British merchants and manufacturers, who have trusted our [our ?] people, doubtless understand this.”

He adds “That in a single city, New York, more than six thousand of its inhabitants were declared insolvent in one year.”

Now in the first place, almost every matter of fact asserted in this paragraph is stated incorrectly and untruly. It is not true that in every State the insolvent laws operate as a general jail delivery of all debtors, there being, in a majority of the States, no insolvent law at all.

It is not true, that there is no appeal in these matters, to the Federal courts; on the contrary, there is an appeal, in all cases, from decisions in the state courts, on the insolvent laws of the State, to the Supreme Court of the United States, — an appeal, which exists not only theoretically, but practically, and has been resorted to often, and with effect.

It is not true, that the number of insolvents, meaning such as have been discharged under statute provisions, is prodigious in every State, and increasing. In most of the States, as we have observed, there are no such laws, and of course no “prodigious numbers” who have been, or who can be discharged under such laws.

Having now shown how destitute of all correctness and all truth is the foregoing paragraph from Mr. Bristed’s book, we proceed to describe the real state of the case.

At the formation of the present government in 1787, it was

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provided by the national Constitution, that Congress should have power to establish uniform rules on the subject of bankruptcy throughout the United States. This power was not exercised until 1798, when a uniform system of bankruptcy was established by act of Congress. It met with great opposition, arising in a great variety of motives, and was repealed four or five years afterwards. It is, no doubt, to be lamented that a fair experiment was not given to this law. It is a subject on which it seems necessary that there should be some legislative provision; and notwithstanding the frauds which will be, and are committed under bankrupt laws, even well administered, and which have led such men as Lord Eldon and Sir Samuel Romilly to express doubts of their general utility, yet we know not any other mode of providing for the cases continually arising in commercial societies, and which call loudly for some provision. After the repeal of the law, however, individual States, acting upon the supposition that as Congress had not exercised the power, or had discontinued its exercise, of establishing a general law, for the whole country, they had a right to provide insolvent laws, as a part of their own local legislation, enacted such laws, and gave them operation. Among others, the State of New York passed an insolvent law, in the year 1811, and, as was to be expected, in the first year of its operation, many discharges were obtained under it. It was found that this law not only gave too great facilities in obtaining discharges, but that it led also to fraudulent applications from debtors coming from other States. The law was repealed, we believe, within a year after its enactment; and it was, we suppose, during the period of this very short and extraordinary act, that Mr. Bristed finds his six thousand discharged in one year. Here then is a single act from which a general law and a general practice is unhesitatingly inferred. "The British merchants and manufacturers who have trusted our people doubtless understand this." Does Mr. Bristed mean that the credit of American merchants is not good in England? It would be new to us, indeed, to hear such a remark. Surely never was, not only all due credit, but all undue credit more easily obtained, than by the American merchants, for British manufactures.

The flippant and off-hand remark that the laws of this country generally favor the debtor, at the expense of the creditor, is grossly incorrect, and can hardly be pardoned. There may be, among the state legislatures, an occasional relaxation, but to say that the general scope of the laws of this country is to favor the debtor at the expense of the creditor, is absolutely untrue and calumnious. We still hold in almost, if not in every State, to the imprisonment of the person for debt; we still hold every man to be in law capable of paying to the uttermost farthing; and therefore we apply the old principle, *solvat per corpus, qui non possit crumena*. We discourage marriage settlements and family settlements, to an extent, in the opinion of some, far too great; even lawgivers and tribunals all look with jealousy on trusts and entailments, and all the various modes of tying up estates and rendering them unalienable; and all this simply from respects to the rights of creditors.

In most of the States also, the fee simple of the debtor's estate may be taken to satisfy the creditor; and lastly, we hold that whatever laws the individual States may pass respecting insolvents, such laws, if they in any manner impair the validity of contracts, are absolutely null and void. We have from the first introduced and maintained this great and salutary and protecting principle in the fundamental articles of the national Government; and yet Mr. Bristed can say, and the reviewers in England can believe, that in this country the laws are generally made to favor debtors at the expense of the creditors! Every well-informed man knows the difficulty of legislating on the subject of insolvents; and none better than the eminent living judicial characters in England. We now speak of the insolvent laws, as distinguished from the bankrupt laws; since the insolvent laws which individual States have sometimes enacted in this country, resemble the *cessio bonorum* of the civil law, and the insolvent laws of England, much more than the bankrupt system of that country.

We wish, before gentlemen in England give credit to such loose calumnies as this of Mr. Bristed's upon the laws for the relief of insolvent debtors in the United States, they would attend to their own case, and to the difficulties which they

themselves have experienced on this subject. This would, we think, give some moderation to their fault-finding, and some measure to their language of rebuke. We wish they would consult Lord Eldon, Lord Redesdale, Lord Aukland, Mr. Sergeant Runnington, the late, and Mr. Reynolds, the present judge of the insolvent debtors' court, upon the unavoidable obstacles and difficulties which lie in the way of uniting on this subject the just claims of creditors, with due compassion for honest but unfortunate debtors. When they have done this, we shall hear with somewhat more patience what they may see to find fault with in the systems adopted by their neighbors.

It is well known that it has been the practice of Parliament to grant occasional relief to such insolvent debtors as do not come within the provision of the bankrupt laws. And it being thought expedient to make a permanent provision on the subject, Parliament passed the Act 53 Geo. III. chap. 102. This act, we believe, was drawn by Lord Redesdale, a man of the highest legal eminence, and of great experience. It has sixty sections, and appears to have been prepared with the utmost care and solicitude, in order that it might prevent, on the one hand, the harsh and unfeeling confinement of honest debtors, and on the other, the practice of fraud by the dishonest. This act was limited to November, 1818, and to the end of the next session of Parliament. The powers and duties of the act were to be exercised and discharged by a judge, or commissioner, who should be some "fit person, being a barrister or lawyer of six years' standing at the court," and Mr. Sergeant Runnington was appointed to this office. We have already said that the act contained all the provision which could be thought of to prevent fraud on the one hand, and cruelty on the other; an application to be discharged was to be accompanied with an offer to assign all his property, excepting wearing apparel, bedding, and tools of his trade, never exceeding in all twenty pounds; and there must be annexed to the petition a schedule of property and effects, and another of debts due by the prisoner, and the prisoner's oath to the truth of these schedules; and every creditor to be served with a copy of the petition and schedule, and notice inserted in the Gazette, and

other newspapers, and creditors to have a right to appear and to put any questions to the prisoner, touching his conduct under oath; and assignees to be appointed to receive his assets, books, &c., of all sorts; and then the court, after all, may annul his discharge if it shall appear to have been obtained by fraud, or revoke it, if it afterwards appear that he has ability to pay his debts. The assignees are required to get in effects and debts, and make distribution at the end of three months, &c., with proper penalties for perjury; with a train of exceptions, such as attorneys embezzling money, persons getting money on false pretences, &c., who are not to be allowed the benefit of the law.

Here then is a law for the relief of insolvent debtors, fully considered, and deliberately passed, guarded by all practicable securities and limitations, and placed under the administration of a competent and learned court; and what is found to be the result? The law was to expire in July last, at the end of the last session of Parliament, unless continued by another act. To prevent this continuing act, very numerous and very respectable petitions were laid on the table of the Lords and Commons. Innumerable and intolerable frauds were alleged to have been perpetrated in the cases arising under the act. A committee of the House of Commons reported, if we mistake not, "That during the whole duration of the law, and out of the prodigious number of cases in which debtors had surrendered their property and been discharged, there had not been received above a penny in the pound upon the average of the debts discharged." This we quote from memory, but our statement is sufficiently exact for our purpose.

We have thus alluded to the experience of England on the subject of insolvent debtors, not by way of an idle retort, but to expose the intrinsic difficulty of the subject, and to shut up the mouths of half-informed, superficial, and self-sufficient scribblers and rebukers, on both sides the Atlantic. Would it not be wrong from the facts which we have stated to infer a plausible case of enormous fraud and corruption against English justice? If we were to try our hand at such a paragraph as Mr. Bristed has written and the Quarterly Review has cited against us, might we not say: "England is not a

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country for a man to recover his debts. All her merchants who are debtors are provided for, by what she calls her system of bankruptcy, — a stupendous system which many of her most eminent lawyers have been honest enough to confess was productive of unmeasured fraud and injustice; and as to all the rest of her subjects who may owe anything, there is the insolvent debtors' court, where anybody may be discharged; and of this court it is enough to say, that during all its existence, although no man can be discharged without surrendering all his property, which the law says shall go to his creditors, yet in truth no creditor ever gets anything. How much the officers of the court get, we do not know; and what becomes of that part which they do not get, we do not know, but we do know that the creditor gets nothing." We forbear. It is hardly fit to write such paragraphs, even for the mere purpose of showing how easily they may be written. It is a dangerous curiosity to commit sins, only to learn or to show with what facility sins may be committed.

An act of the last session of Parliament was intended, we believe, to have continued the insolvent debtors' law to the present session. Owing to mistake, however, the purpose was not effected, and the law is supposed to have expired, and proceedings under it are for the present discontinued. The subject, however, is before Parliament, and it will give us unmixed pleasure if the English Government shall be able to adopt such legislation on this equally important and difficult subject as shall satisfy the necessities of its own case, and afford light to the lawgivers of other countries. In the mean time let it not be understood that the law of creditor and debtor is in a worse state for the creditor in this country than in others. As before observed, some of the States may have occasionally departed, and may still occasionally depart from the dictates of enlightened wisdom on this subject, from a disposition to relieve hardship, and from a vain and illusory hope of finding, in mere remedial legislation, a relief against the pressure of the times and the stagnation of trade. But the general scope and tendency of our laws is to give creditors full and ample remedies, and to render property of all sorts liable for debts. We may say, indeed, that there is no country

in the world in which a regard for the rights of property is more likely to prevail; for in no country was property ever so equally diffused, or was so great a portion of the numerical population interested directly in the laws which protect it. We look upon this so equal distribution of property, and to the regard paid to the rights of property in this country, as the great safeguards and security of the Commonwealth. Almost every man among us is interested in preserving the state of things as it is; because almost every man possesses property, and while he cannot see what he might gain, he sees clearly what he might lose, by change. We think we may perceive here a fair ground of belief in the preservation of our republican forms of government. It is not less the language of reason than of experience, that property should have influence in the State whenever such a state of things exists, as that military fame is not supreme. If the tendency of the laws and institutions of society be such, as that property accumulates in few hands, a real aristocracy, in effect, exists in the land. This is not a merely artificial, but a natural aristocracy, — a concentration of political power and influence in few hands, in consequence of large masses of property having accumulated in such hands. There is not a more dangerous experiment than to place property in the hands of one class, and political power in those of another. Indeed such a state of things could not long exist. We have seen something like it in the ancient *noblesse* of France, in relation to whom the attempt seemed to be to make up, in positive power, or artificial distinction, what was wanting in the natural influence of property and character. The generality of these personages with all their pretensions to rank, and all their blazoning of heraldry, were infinitely inferior in respectability, and in just influence in the state, to hundreds of the untitled but independent landholders of Great Britain. It will be disastrous, indeed, for this latter country, whenever a separation shall take place between the influence, the indirect, but the natural and salutary influence of property, and political influence or political power. They would not, and as we have already observed, in the absence of direct, military despotism cannot be long separated. If one changes hands, so will the other.

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If the property cannot retain the political power, the political power will draw after it the property. If orator Hunt and his fellow laborers should, by any means, obtain more political influence in the counties, towns, and boroughs of England, than the Marquis of Buckingham, Lord Stafford, Lord Fitzwilliam, and the other noblemen and gentlemen of great landed estates, these estates would inevitably change hands. At least so it seems to us; and therefore when Sir Francis Burdett, the Marquis of Tavistock, and other individuals of rank and fortune, propose to introduce into the government annual parliaments, and universal suffrage, we can hardly forbear inquiring whether they are ready to agree that property should be as equally divided as political power; and if not, how they expect to sever things which to us appear to be intimately connected.

These speculations, however, are beside our present purpose. We mean only to say, that, in the present state of the world, wherever the people are not subject to military rule, the government must in a great measure be under the guidance of that aggregate of indirect but salutary influences, of which property is an essential ingredient, along with other ingredients, doubtless, of intelligence, public spirit, and high and fair character. And that as in this country almost the whole people partake of the blessings of property, so must they also partake in the desire to protect property, and of course in laws which furnish that protection. The evils and difficulties which exist among us, in regard to insolvency, belong to the subject itself, and are not confined to our community. The highly commercial state of the world has elevated two subjects of legislation, in our day, to a very great degree of importance. One respects the prevention and punishment of those crimes which are committed on property, such as theft, forgery, &c., which have increased, in late times, far more than the more violent offences, such as murder, and assault, and the other crimes which spring from passion, revenge, or cruelty. The other respects the provisions necessary to be made relative to insolvents, and the proper degree in which there may be a mitigation, in certain cases, of the ancient rigor of imprisonment for debt. These important subjects are full of inherent difficulties. None of the ancient codes furnish examples

which can be safely followed, because such a state of society as exists now existed in none of the ancient states. The systems adopted among the modern nations are not yet satisfactory to themselves. In France, we know that these subjects have lately attracted much consideration. In Holland, a revision of the whole system is before a commission appointed for that purpose. In England, one of these subjects, the reformation of the criminal code, is before a committee of the House of Commons, at the head of which is Sir James Mackintosh. The bankrupt laws are, or lately have been, under investigation before another committee, and the Insolvent Debtor Act is receiving great attention from some of the principal men in either House of Parliament. In our own country, we know that Congress has for two sessions discussed a proposed system of bankruptcy, and that several of the state legislatures are desirous, as far as their power extends, to make just and wise provisions on the subject of insolvency, in case the power of Congress to establish a bankrupt system shall not be exercised. Intelligent men, we trust, will thus see that the law of creditor and debtor in the United States is not such as to cast that imputation on the character of our legislation which Mr. Bristed's book would authorize, and which the Quarterly Reviewers would confirm and circulate. If our code be not perfect, neither is the code of any other nation perfect; and whatever ignorant or prejudiced men may write or may believe about us, those who have sense and candor will distinguish between what is inherent in a difficult subject, and what is the result of unskilful or dishonest legislation.

The Constitutional Rights and Privileges of Harvard College

JANUARY 4, 1821.¹

COMMONWEALTH OF MASSACHUSETTS.

IN CONVENTION, Jan. 4, 1821.

THE Committee appointed to inquire into and report upon the *Constitutional Rights and Privileges of the Corporation of Harvard College*, and to report also, an account of the donations which have been made to that Corporation by the Commonwealth, ask leave now to report:²

That, in the year one thousand six hundred and thirty six, the General Court of the Colony agreed to appropriate £400 towards a School, or College. In the year following, it was ordered that an Edifice should be erected for that purpose at Newton, and twelve gentlemen were appointed a Committee to have charge of the subject. In 1638, the name of Newton was changed to that of Cambridge; and it was ordered, that the College, to be erected at Cambridge, should be called Harvard College, in honor of the Rev. John Harvard, of Charlestown, who had contributed liberally to the fund. And in 1640, the Rev. Henry Dunster was appointed first President. At this time, the property, appropriated to the support of the College, by the General Court, had not been vested in any persons whatever. It remained the property of the Colony, and was managed by a Committee of the General Court, or by the

¹ Report upon the Constitutional Rights and Privileges of Harvard College; and upon the Donations that have been made to it by this Commonwealth. Printed by Order of the Convention. Russell and Gardner, Printers, 1821.

² The Committee was appointed December 30, 1820, and consisted of Messrs. Webster of Boston, Dearborn of Roxbury, Wilde of Newburyport, Tillinghast of Wrentham, and Saltonstall of Salem.

Magistrates and Elders, by Authority of the General Court. This being found an inconvenient mode of administering the fund, an act was passed, in 1642, by which the Governor, Deputy Governor, and Magistrates, and the Teaching Elders, of the Towns of Cambridge, Watertown, Charlestown, Boston, Roxbury, and Dorchester, together with the President of the College, were constituted a Board of Overseers, with power to make orders, statutes, and constitutions, for the rule and government of the College, and to manage and dispose of its lands and revenues. The fund remained in this situation until the year 1650, when the General Court, on the application of the President, granted a Charter, by which seven persons, to wit, the President of the College and the Treasurer, *ex officio*, and five individuals, by name, were constituted a Corporation, by the name of the "President and Fellows of Harvard College," to have perpetual succession, and with power to fill vacancies, occurring in their own body, by their own election, with the consent of the Overseers. All powers of Government, the whole management and control of the property and funds, and direction and instruction of the students, appear by this charter, to have been conferred on the President and Fellows; with a provision, however, that the acts of the Corporation should not take effect until the approbation or assent of the Overseers was obtained.

It appears soon to have been found, that a great inconvenience arose from holding all orders, by-laws and acts of the Corporation in suspense, until the pleasure of the Overseers could be known; and on that account, on the application of the Overseers, a Supplemental Charter was granted, in 1657, by which all orders, by-laws and other acts of the President and Fellows were to have immediate force and effect; subject, however, to be reversed, or rescinded by the Overseers, if they should not approve them. By these Charters, all the property, appertaining to the College, became vested in the President and Fellows, for the purposes of the Institution; and all powers of superintendence and control were in like manner conferred on them, subject, as before mentioned, to the approbation or disapprobation of the Overseers. The Government of the Colony was the Founder of this Institution; not in consequence

of having granted the Charter, but in consequence of having made the first endowment. As Founder, it was entirely competent to the Government to prescribe the terms of the Charter, to grant the property, subject to such limitations as it saw fit, and to vest the power of visitation and control, wherever it judged most expedient. This power, the Government thought proper to vest, to the extent, and in the manner before mentioned, in the Board of Overseers ; and subsequent donors had a right, of course, to expect, that donations, made by them, would be managed, and applied to their intended objects, by the College Government, thus constituted, without substantial variation. Between the year 1657, (the date of the Supplemental Charter) and the time of the Provincial Charter of William and Mary, sundry alterations were proposed in the Charter of the College ; such as, among other things, to give the College Government civil jurisdiction, in certain cases, after the manner adopted in other Institutions. None of these alterations, however, took place. By the Provincial Charter, in 1691, the Crown of England confirmed to the College, as well as to other bodies, corporate and politic, all its property, powers, rights, privileges and immunities. At subsequent periods, attempts were again made, for further alterations of the Charter, but without success.

By the present Constitution of the Commonwealth, adopted in 1780, it is well known, all the powers, authorities, rights, liberties, and immunities of the College were expressly confirmed ; and all gifts, devises and legacies, made or given to it, declared to be forever bound and applied to their respective purposes, according to the will of the donors. And, inasmuch as the Revolution, and the establishment of a new Government had made it necessary to declare who should be deemed successors to those persons, who, under the old Government had been, *ex officio*, members of the Board of Overseers, it was declared, that the Governor, Lieutenant Governor, Council and Senate, should be such successors ; and that they, with the President of the College, and the Ministers of the Congregational Churches, in the Towns of Cambridge, Watertown, Charlestown, Boston, Roxbury and Dorchester, should constitute the Board of Overseers ; with a provision, that the Legis-

lature might, nevertheless, for the advantage of the College, and the interest of Letters, make alterations in its Government, in the same manner, as they might have been made by the Provincial Legislature. In the Constitution of the Corporation no change has been made, since the date of the first charter; but within the last ten years, several laws have passed, having for their object, modifications of the Constitution of the Board of Overseers. Some of these laws have passed with the assent, and on the application of the Corporation and Board of Overseers; and one of them has passed without the previous consent of either. The last Law on this subject is the Act of February, 1814, which passed with an express provision, that its validity should depend on the assent of the Board of Overseers, and of the Corporation. Both of these bodies assented to, and accepted this act, and the present actual government of the College is conformable to its provisions. It may be useful to state here, how the Government of the College is at present formed and constituted, under this law.

In the first place then, the Corporation, as before mentioned, exists in the form prescribed by the first charter.

It consists of seven members; it invests the revenues, protects the property, and has the immediate charge of the interests of the College; and it appoints Professors, Tutors, and other officers; subject, however, in all these appointments, to the approbation or disapprobation of the Board of Overseers. The Board of Overseers is composed of the Governor, Lieutenant Governor, Council, Senate, Speaker of the House of Representatives, and President of the College, together with fifteen Ministers of Congregational Churches, and fifteen Laymen, all inhabitants within this State, elected, and to be elected, as vacancies occur, by the Board itself. If the contemplated arrangement, as to the number of Senators and Councillors, hereafter to be chosen in the State, shall take place, this Board will consist of seventy-seven members; of whom forty-six will be such persons as shall be annually chosen by the people, into the offices of Governor, Lieutenant Governor, Councillors, Senators, and Speaker of the House of Representatives; and thirty other persons, such as these officers, being themselves a majority of the Board, shall, with

the other members, see fit, from time, to time, to elect, to fill vacancies which may occur.

Such is the existing Constitution of the Government of this Institution ; and, with one exception, hereafter to be mentioned, the Committee are of opinion, that it is a well contrived and useful form of government. The Corporation consists of but few persons ; they can, therefore, assemble frequently, and with facility, for the transaction of business, either regular or occasional. The Board of Overseers, having a negative on the more important acts of the Corporation, is a large and popular body, a great majority of its members being such as are annually elected to places of the highest trust in the Government by the people themselves. A more effectual control, over the proceedings of the Corporation, cannot be desired.

Indeed if a new government were now to be framed, for an University, independent of all considerations of existing rights and privileges, the Committee do not know that a better system could probably be devised. The history and present state of the institution, speak the most decisively, as well on the plan of its government, as on its administration. As to the care and management of the funds, it is believed to have been cautious, and exact, in a very high degree. No delinquency, to the amount of a single shilling, is known to have existed in any member of the corporation, or any of their agents or servants, from the time of the first donation, in sixteen hundred and thirty-six, to the present moment.

How far this government of the University has been found competent to conduct its literary concerns, and to what respectability, and distinction, among the institutions of the country, it has raised it, neither the Members of this Convention, nor the citizens of this Commonwealth, nor the people of the United States, need be informed.

The exception, before alluded to, is, that, by which the Clergymen, composing part of the Board of Overseers, are to be elected from Christians of a particular denomination. However expedient, or indeed however necessary, this might have been originally, the Committee are of opinion, that no injury would arise, from removing the limitation, and that such a measure would be satisfactory. It seems to have been

taken for granted, that the Legislature, with the consent of the Corporation and Overseers, had power to modify the Constitution of the Board of Overseers, in the manner prescribed by the Act of 1814. In the opinion of the Committee, however, modifications of the Government of this most important Institution should not rest merely on the authority of Legislative acts. Those who formed the Constitution, in 1780, appear to have deemed the subject of such high importance as to require Constitutional Provisions, and the Committee are of opinion, that that precedent is fit to be followed. They have, therefore, deemed it proper to recommend to the Convention to propose an article to the Constitution, removing the restriction before mentioned, and confirming, in all other respects, the existing Constitution of the College. Having communicated this opinion to the Corporation, and to the Board of Overseers, both these bodies have signified their consent, to such an article; as may be seen by their votes, certified copies of which, accompany this Report.

The Committee have no further remarks to make on the Constitutional rights and privileges of the College, except, that like all other Charities, it is under the dominion, and control of the Law. All officers and servants of any Institutions, whether established for the purpose of Religion, or Learning, or the relief of the indigent, are answerable for a strict and faithful execution of their trust. And any individual, who may be injured, has his remedy, as promptly as in other cases of injury. Or if any abuse, or perversion of the funds, be known or suspected, a full account may be called for, and ample justice administered, in the tribunals of the country. The Committee make this remark, in order that there need exist no jealousy in the public towards any charitable Institutions in the State, arising from an apprehension that there is, or can be, any immunity in such Institutions, for mal-administration, any concealment of their transactions, any unseen or unknown mismanagement of their property, or any exemption from a full and perfect legal responsibility for all their conduct.

The Committee now proceed to the second object of their appointment; which was to obtain an account of the donations which have been made to the College, by the Commonwealth;

and although not within the letter of their instructions, the Committee have thought fit to inquire into those other aids, besides immediate donations, which the College has received from the State; and also into the proportion which the public grants bear to private and individual donations.

The Committee, in making this inquiry, have conferred with the President, the Treasurer, and another member of the Corporation, as a Committee of that Board, attending at the request of the Committee; and from these gentlemen, have received all the information which they have requested.

As has been already observed, the colony gave £400, for the first endowment of the Institution. In 1640, it granted to the College the right of keeping a Ferry over Charles River. For many years this privilege was of little importance, not yielding a net income of more than twelve pounds annually; it gradually increased, however, and was of so much consequence, when Charlestown Bridge was erected, in 1786, that the proprietors of that bridge became bound, in their charter, to pay the College £200, annually, for the loss of their ferry. Two other bridges, more recently erected over the same river, for a similar reason, pay to the College, each the sum of one hundred pounds annually.

In addition to this grant of the ferry, which, as has been before observed, was of little importance, in early times, the General Court of the Colony was in the practice of making annual grants, in aid of the College, and to assist in the payment of the salaries of the President, Professors, and Tutors. This practice was long continued, and did not entirely cease until after the revolution. These sums being given to maintain the College from year to year, were of course appropriated and exhausted as fast as they were received, and no fund, consequently, was ever produced by them.

Before the Revolution, certain lands, in Maine, were given to the College by the General Court, from which it has realized eight thousand dollars, and does not expect to receive above seven thousand more. Massachusetts Hall was built by the Province, in 1723; Hollis Hall, in 1763; and on the burning of Harvard Hall, while in possession of the General Court, in 1765, it was rebuilt at the public expense. Holworthy Hall,

and Stoughton Hall, were built principally by the proceeds of Lotteries, authorized by the Legislature, but managed and conducted at the expense and risk of the College. In 1814, on the petition of the College, the Legislature granted it ten thousand dollars a year, for ten years, out of the proceeds of the tax on Banks. Three objects were intended to be answered by the application for, and reception of, this liberal and munificent grant. The College had undertaken to build University Hall, an edifice which it deemed necessary and essential, but the cost of which pressed hard upon its funds. The first object of the grant was, to pay the expense of this building. It was desirable, also, that there should be a building erected for the use of the Medical School ; and, lastly, a fund was wanted for the charitable support of necessitous young men of merit, the sons of poor parents, who, without the aid of charity, could not go through a course of education ; and in whose possession of the means of knowledge, the State supposed itself to have an interest. University Hall and the Medical College have accordingly been built ; and that part of the annual grant (one quarter of the whole) which was destined to purposes of charity has been so applied.

Six years, of the ten, have now expired, and University Hall having been built at an expense of sixty-five thousand dollars, and the Medical College at an expense of about twenty thousand dollars, and one quarter part of the grant, being, as before mentioned, appropriated to the use of necessitous scholars, when the four remaining years shall have expired, the College will have invested and applied the whole amount of the grant, with ten thousand dollars of its own funds, to the purposes for which the grant was made. The Committee have inquired particularly into the manner in which this charity is distributed, and they think it wise, impartial and efficacious. In the first place, it is given to none but those who apply for it, and who clearly shew, by proofs from their Instructors, their Ministers, the Selectmen of their town, or otherwise, that they and their friends are necessitous, and unable to supply the means of education. In the next place, it is required that they should be persons of fair character and good behaviour ; and when it is ascertained that the applicant possesses a fair character, and

that he is necessitous, he is admitted to partake in the benefit. The scale of merit, kept by the Instructors of the Classes, is then referred to, and among those who are thus necessitous and of fair character, such as give most proof of talent and promise receive most; those who give less, receive less. It may be added, that this charity is confined to young men of this State. The Committee do not know how a plan could be devised more likely to give effect to the intention of the Legislature. This donation, by the Act of 1814, is the only direct grant of money, by the State, since the year 1786.

In order to compare the amount of donations made by the State, with that of donations by individuals, the Committee have proceeded to inquire into the origin of the College funds, generally; and have received on this subject, also, from the corporation, all the information desired.

The amount of all the personal property holden by the College, and yielding an income, does not exceed three hundred thousand dollars. Of this, more than two hundred thousand dollars consist of donations made by individuals to specific and particular objects; so that over this part of the funds, the Corporation has no other control whatever, than to apply the annual proceeds thereof according to the will of the donor.

A munificent individual, for instance, chooses to establish a Professorship, in any branch of literature, and for this purpose makes a donation to the College, and in his deed, or other instrument of gift, limits the application of the proceeds of the fund to this particular object. In such case the Corporation has nothing to do, but to see the fund properly invested and secured, and that a fit person be appointed Professor, to receive the income of it for his support. So, of funds given to aid poor scholars, to augment the library, and other similar objects.

Of the remainder of the personal property, a considerable portion, viz. about eighteen thousand dollars, arises from private donations, for objects not immediately connected with the College; such as the maintenance of missionaries, and in one instance, of a grammar school. The general unappropriated fund of the College, vested in personal property, yielding an income, deducting some debts now chargeable upon it, is

fifty-five thousand dollars. The real estates of the College, except the public edifices before mentioned, are derived, principally, from the donations of individuals; but partly from purchases made from the College funds. The whole income of its real estates, including what it receives from the proprietors of the several bridges, amounts to five thousand dollars annually; of which one thousand is appropriated to specific objects by the donors. The sums received from students, as rents for the apartments occupied by them, are usually absorbed in the repairs of the various College buildings. The income of that part of the personal property, which is not appropriated to specific objects, and of that part of the real estate, in like manner, not appropriated to specific objects, constitutes the general disposable income of the College, applicable to its general purposes; such as paying the Instructors and Officers, defraying occasional expenses, and making up, in some cases, a deficiency in a particular specific donation, so that the object of the donor may be effected, and the public enabled to receive the benefit of his gift.

The amount of this general disposable income still falls so short of its object, that a large sum is necessarily raised by tuition fees. The whole annual expenditure of the College, including all the general and specific objects, is, at this time, about thirty thousand dollars, of which, seventeen thousand are paid by the proceeds of College Funds, general and specific, and the residue by tuition fees, and other charges on the students. The President, twenty Professors in the several departments of Science, Literature, Divinity, Law and Medicine; six Tutors, the Librarian, Steward, and other officers, are paid out of these receipts; as also the expense of books for the library, apparatus for the philosophical and chemical departments, and other daily expenses incident to such an Institution. The accounts of the Treasurer, of the receipt and disbursement of the moneys of the Institution, are, from time to time, audited by a Committee of the Corporation, and also by a Committee of the Board of Overseers.

From this account of the state of the funds, it is evident that the establishment of the Institution, on the present enlarged plan, is not, and cannot be, kept up, but by the help of tuition

fees. And donations and additions to the general and disposable funds of the College, would be highly useful to the public, as they would diminish the necessary expense of education.

In pursuance of the opinion formed by the Committee on that part of the subject committed to them, which respects the Constitutional Rights and Privileges of the College, they recommend the adoption of the following Resolution, viz : —

Resolved, That it is proper to amend the Constitution, by providing, that the rights and privileges of the President and Fellows of Harvard College, and the Charter and Constitution thereof, and of the Board of Overseers as at present established by law, be confirmed ; with this further provision, viz. : That the Board of Overseers, in the election of Ministers of Churches to be members of said Board, shall not be confined to Ministers of Churches of any particular denomination of Christians.

For the Committee,

D. WEBSTER

The Doctrine of Nullification

[1830.¹]

BUT the most bold and imposing form in which the doctrine of nullification has been presented, is doubtless to be found in the Exposition and Protest of the Legislature of South Carolina in December, 1828. It seems to have been judged expedient at that time to put forth the nullifying power of the State in bold relief. This exposition is a labored argument for the power of nullification; and, whatever may be thought of its train of reasoning, its conclusions and results are at least clearly stated. Its purpose is not disguised. The general understanding assigns its authorship, not to the committee, but to a distinguished citizen of South Carolina, holding at present a very high place in the Government of the United States.

The doctrines clearly announced in it are: 1. That it is a most erroneous and dangerous proposition to maintain that the Supreme Court of the United States has constitutional authority to decide on the extent of the powers of a State government, its decisions being final only when applied to the authorities of the departments of the General Government. 2. That “universal experience” (lest we should seem to do the distinguished author injustice, we cite the very words) — that “universal experience, in all ages and countries, teaches that power can *only* be met by power, and *not* by reason and justice, and that

¹ In Mr. Webster's handwriting. Reprinted from the Life of Daniel Webster, by George Ticknor Curtis, I., 352, 353. The passages quoted by Mr. Webster, are from the original draft of the South Carolina Exposition, prepared for the Special Committee on the Tariff, and, with considerable alterations adopted by the Legislature of South Carolina, December, 1828. It was written by John C. Calhoun, and is included in his Works.

all restrictions on authority, unsustained by any equal antagonist power, must forever prove *wholly* insufficient in practice. Such," he adds, "also has been the decisive proof of our own short experience." 3. That the right of judging and finally deciding on the extent of their own powers is an essential attribute of sovereignty, of which the States are not and cannot be divested. 4. That power being divided between the General Government and the State governments, it is impossible to deny to the States the right to decide on the infraction of their own rights, and the proper remedy to be applied for their correction. 5. "But the existence,"—here we quote the very words again, lest it should seem incredible that such a position had been taken—"but the existence of the right of judging of their powers, clearly established from the sovereignty of the States, as clearly implies A VETO OR CONTROL ON THE ACTION OF THE GENERAL GOVERNMENT, on contested points of authority; and *this very control is the remedy which the Constitution has provided to prevent the encroachment of the General Government on the reserved rights of the States.*" 6. The practical result of the foregoing doctrines is then stated in the following words: "That there *exists* a case (the tariff) which would *justify* the interposition of this State, and thereby *compel* the General Government to abandon an unconstitutional power, or to make an appeal to the amending power to confer it by express grant, the committee do not in the least doubt, and they are equally clear in the *existence* of a *necessity* to justify its exercise, if the General Government should continue to persist in its improper assumption of powers belonging to the State; which brings them to the last point which they propose to consider—When would it be proper to exercise this high power?"¹

¹ The Exposition and Protest of the South Carolina Legislature are printed in the Acts and Resolutions of the General Assembly of the State of South Carolina, passed in December, 1828. The Protest was also printed in the Journal of the United States Senate, February 10, 1829.

Memorandum on the Currency

1831.¹

ONE of the first things which engaged my attention after I had become a member of Congress, was the currency of the country. It had become greatly deranged. The old Bank of the United States had expired in 1811, and on that occurrence a great mass of additional banking capital had been put in operation in the several States. Upon the breaking out of the war, most of the State banks had suspended specie payments. This was followed by the greatest irregularity and disorder in the currency of the country. Bank paper was depreciated on a scale rapidly descending from North to South. The banks of Boston paid specie on demand, and of course their paper was equivalent to specie. But the notes of the New York banks were ten *per centum* below specie value, those of Philadelphia fifteen, Baltimore twenty, and Washington twenty-five. Taxes, duties, and debts to the Government were everywhere paid in the bills of the local banks. This was undoubtedly against all law, because bank notes were not money, and because, so far as respected custom-house duties, there was an express statute, of long standing, requiring them to be paid in gold and silver coin. One effect of this monstrous derangement of the currency was that, in some quarters, the public burdens were discharged at ten, twenty, or twenty-five per cent less payment than in other quarters. Throughout all the debates on the bank question, I kept steadily in view the object of restoring the currency, as a matter of the very first importance, without which it would be impossible

¹ From a memorandum, dated 1831, in Mr. Webster's handwriting printed in *The Life of Daniel Webster*, by George Ticknor Curtis. The original MS. was probably lost when Mr. Curtis's Webster papers were destroyed by fire.

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to establish any efficient system of revenue and finance. The very first step toward such a system is to provide a safe medium of payment. I opposed, therefore, to the full extent of my power, every project for a bank so constituted that it might issue irredeemable paper, and thus drown and overwhelm us still more completely in the miseries and calamities of paper money. I would agree to nothing but a specie-paying bank.¹

The first Bank of the United States, chartered in 1791 for twenty years, had given rise to a fundamental difference of opinion in the Cabinet of President Washington on the question of the constitutional power of Congress to create such an institution. Hamilton was its principal advocate, and Jefferson its principal opposer. In 1811, the party which had originally opposed the bank defeated the renewal of its charter. In 1814-15, the exigencies of the Administration strongly demanded such an institution, and a bill to create one was introduced. Congress was at that time divided into three parties on this subject. The first consisted of those who were against a bank under any form. The number of these persons was considerable. They belonged generally to the friends of the Administration. They voted, therefore, for the bank, or rather with its friends, on all preliminary and incidental questions, but on the final passage they voted against the bill. Accordingly, there was always a body of members who, from their original opposition to any national bank, were at last to be found voting against any project of the kind.

Second, there was a party among the supporters of the Administration who were in favor of a bank, provided it should be such a one as they thought would not only regulate the currency and facilitate the operations of Government, but would also afford present and important aids by heavy loans, for which purpose it was to be relieved from the necessity of paying its notes in specie. This party, therefore, was in favor of an irredeemable paper currency.

The third party consisted of those who were willing to create a

¹ The debates upon the National Bank Bill occurred in December, 1814, and January, 1815. This bill proposed to constitute a bank with a capital of fifty million dollars, of which four millions only were to be in specie. Mr. Webster opposed the bill, and his speech against it is included in his Collected Works.

bank with a reasonable amount of capital, compelled always to redeem its notes in specie, and at liberty to judge for itself when it would and when it would not make loans to the Government. With these Mr. Webster acted.¹

THE NATIONAL BANK OF 1816²

ON the introduction of the bill to incorporate the present bank, I opposed its proposed amount of capital—fifty millions—as being unnecessarily large, and still more vehemently the power proposed to be given to the President of the United States, to authorize a suspension of specie payments. In both these respects, my opposition, with that of others, was successful: the proposed amount of capital was reduced, and the power to authorize a suspension of specie payments was stricken out. It was also my opinion that the Government should have nothing to do with the appointment of directors, as it had not in the first bank. As the Government itself was to be a large subscriber to the present institution, it was by some deemed reasonable that it should have its proper voice in the annual constitution of the board of directors. But I was opposed to the subscription to the stock on the part of the Government, and this, together with the appointment of Government directors, and a hope of other useful changes in the charter, influenced my final vote, which is known to have been against the bill. I was at special pains to convince Congress and the country that a paper bank would be ruinous; a bank with an inordinate amount of capital, such as fifty millions, dangerous; and that all hope of restoring the currency of the country, even by means of the best conducted bank, futile, until the Government itself should execute existing laws, and require payment of debts and taxes in legal coin, or in the paper of specie-paying banks.

The peace did not put an end to the disorders of the currency. The State banks did not resume specie payments. The present Bank of the United States was incorporated; and

¹ This statement of the condition of parties in that Congress is taken almost *verbatim* from Mr. Webster's own memorandum. — GEORGE TICKNOR CURTIS.

² From Mr. Webster's Memorandum.

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it was under these circumstances that I brought forward the resolutions of April, 1816.¹ When introduced, they bore a preamble which, I dare say, appears on the Journal, and which may perhaps be worth looking up. This was dropped in the progress of the measure, as it was thought to be unimportant, and as it implied some sort of censure on the past administration of the Treasury. The resolutions had all the desired effect. They brought about an entire change in the currency of the country. Duties and taxes, debts for lands, &c., were then equally borne and equally paid. After some years of unfortunate management, the national bank took a good direction; and from that time to this the United States have had a currency perfectly sound and safe, and more convenient, and producing local exchanges at less expense, than any other nation is or ever was blessed with.

¹ See Mr. Webster's speech, "The Legal Currency," in his Collected Works. The following are the Resolutions referred to:

Resolved, by the Senate and House of Representatives of the United States of America in Congress, assembled, That all duties, taxes, imports, and excises, laid or imposed by Government, ought, by the provisions of the Constitution, to be uniform throughout the United States; and that no preference ought to be given or allowed by any regulation of commerce or revenue, to the ports of one State over those of another.

And resolved further, That the revenues of the United States ought to be collected and received in the legal currency of the United States, or in Treasury notes, or in the notes of the Bank of the United States, as by law provided and declared.

And resolved further, That the Secretary of the Treasury be, and he is hereby, required and directed to adopt such measures as he may deem necessary, to cause, as soon as may be, all duties, taxes, debts, or sums of money accruing or becoming payable to the United States, to be collected and paid in the legal currency of the United States, or Treasury notes, or notes of the Bank of the United States as aforesaid; and that from or after the 1st day of February next no such duties, taxes, debts, or sums of money accruing or becoming payable to the United States as aforesaid, ought to be collected or received otherwise than in the legal currency of the United States, or Treasury notes, or notes of the Bank of the United States.

The first two resolutions were withdrawn during the debate, and the third, with amendments, was adopted.

Principles¹

1. To sustain the administration in executing the laws; to support all measures, necessary to supply defects in the existing system; and to counteract the proceedings of South Carolina; to limit all their measures, and all this support, to the fair purpose of executing the laws with moderation and temperance, but with inflexible firmness;—to share this responsibility with the Administration, frankly & fairly, without expressing any want of confidence, & without mingling other topics, with the consideration of these measures.

2. Not to give up, or compromise, the *principle of protection*; nor to give any pledges, personal or public, for its abandonment at any time hereafter.

3. To bring down the revenue to the just wants of the Govt.: but this not to extend so far as to prevent Congress from making, for a limited time, a distribution of the proceeds of the sales of the public lands among the States, if Congress shall see fit to make such distribution: nor so far as to prevent appropriations to such objects of Internal improvement, as Congress may think deserving of national aid.

4. To revise the Act of last session, with close scrutiny, & entire candor; & to reduce duties, in all cases, where such reduction can, with any fairness, be asked, & with any safety, granted; having just regard, to the necessities of the Country in time of war, to the faith plighted by existing & previous laws to the reasonable protection of capital, & especially to the security of the interests of *labor & wages*.

¹ From a manuscript, in Mr. Webster's handwriting, in the collection of Hon. George F. Hoar, who has endorsed upon it the following: "This paper was probably drawn up by Mr. Webster about the beginning of the Session of Dec. 1832. Some of its language is found in his Speech of Feb. 8th, 1833. See Curtis' Life, Vol. I. 440-441." The Speech referred to, on the Revenue Collection Bill, is printed in Speeches Hitherto Uncollected, pp. 152-155.

5. If Congress shall not, before the end of the next session of Congress, pass a law for the distribution of the proceeds of the public lands, among the States, those proceeds to be regarded as so much general revenue, applicable to the ordinary purposes of Government ; & the duties on imports to be so much farther reduced as may, by this means, become necessary.

6. Provision to be made to direct the framing of proper issues in law, feigned or real, with a view to submit to the judgment of the Supreme Court of the U. S. the question, whether Congress possesses the Constitution to lay & collect duties on articles imported, for the avowed and only purpose of protecting & encouraging domestic products & manufactures.

7. If the land bill shall pass, then some measure to be adopted to limit, practically, grants by Congress to objects of Internal Improvement, to such as in their nature transcend the powers & duties of separate States.

8. A Comee. of the Senate to sit in the recess to take into consideration the law of the last session (according to Art. 4),—to make a detailed Report, the first day of next session ; accompanied by such a bill, as they may recommend, for the purpose of adjusting the Revenue to the necessities of Government.

NOTE.—My idea would be, that this Comee. should meet in Boston, Oct. 1, & prosecute its inquiries, in Boston, Providence, N. Y., Philadelphia & Pittsburg, if thought necessary.

The Comee. to consist of one N. E. member

one from Middle States,
one from N. W. States,
one from S. W. States,
one from Southern States.”

Objects¹

FIRST, & principal, To maintain the Union of the States, & uphold the Constitution, against the attempts of its enemies, whether attacking it, directly, by Nullification, or seeking to break it up by secession.

2. To support the Administration, fairly, in all its just & proper measures, & especially to stand by the President in his patriotic constitutional principles; & to cherish a sympathy of feeling, & encourage cooperation, in action, with the friends of Union & Liberty, in the South.

3. To sustain the cause of American Capital, American Industry, & more than all *American Labor*, against foreign & destructive competition, by a reasonable, moderate, but settled & permanent system of protective duties.

4. To preserve the general currency of the Country, in a safe state, well guarded agt those who would speculate on the rises & falls of circulating paper; & to this end to advocate the renewal of the Bank of U. S. as the best means of promoting this end, and as especially useful, in this part of the Country, as a check against the combination of other monied influences.

5. To resist & oppose the oppressive & tyrannical combination of the Regency, & to endeavor to rescue the people from its yoke, & to obtain for us all, as citizens of New York, a right of thinking & acting for ourselves, as Independent freemen, &c. &c.; & to expose the political conduct of those who, to favor their own ambitious designs, are doubtful & hesitating, in the cause of the Constitution, & are ready to sacrifice all its vital powers & objects to its enemies.

¹ From the original, in Mr. Webster's handwriting, in the New Hampshire Historical Society. It is endorsed, in another hand, "about June 1, 1833."

6. To oppose, vigorously & unceasingly, all unlawful combinations, all secret oaths, all associations of men, working in darkness, & striving to obtain for themselves, by combination & concert, advantages not enjoyed by other citizens of the Republic.

An Unpublished Speech on the Loss of the Fortification Bill

JANUARY, 1836.¹

MR. PRESIDENT, I have no intention of entering again into this debate. The resolution itself, expressing the propriety of defending the country, I am quite ready to support by my vote, and, as to the various topics which have been discussed, I am willing to leave them without further remark from me.

It might appear, however, affectation of dignity, rather than true dignity itself, were I to take no notice whatever of certain extraordinary occurrences which have taken place since I addressed the Senate on the 14th of January.

In my speech, on that day, I gave my reasons for having

¹ From the Life of Daniel Webster, by George Ticknor Curtis, Vol. I. pp. 532-534.

In his Speech on the "Loss of the Fortification Bill," United States Senate, January 14, 1836, Mr. Webster said: "The honorable member from Ohio near me," (Mr. Ewing), "has said that if the enemy had been on our shores, he would not have agreed to this vote. *And I say, if the proposition were now before us, and the guns of the enemy were pointed against the walls of the capitol, I would not agree to it.*"

"On the 22d of January, a resolution was introduced into the House of Representatives for the appointment of a committee to inquire into the facts attending the loss of the Fortification Bill of the last session. In the course of the discussions on this resolution Mr. Webster's remark was commented on with much severity. Although this was quite unparliamentary, Mr. Webster prepared himself to make a reply to it in his place in the Senate. He very deliberately wrote a speech, in defence of his observation, which he intended to read to the Senate at the first opportunity; but he was dissuaded from it by friends, who considered it both unnecessary and inexpedient. The paper, however, is preserved; and I make some extracts from it, of a very interesting character, which show his adherence under all emergencies, real or pretended, to the requirements of the Constitution."

opposed the vote of the three millions, on the last evening of the last session. I placed that opposition on constitutional grounds. I insisted that the proposed grant of money had no specified object; that it had no limit, within the broadest interpretation of whatever might be called military service; that it conferred on the President the power of deciding whether armies should be raised, or whether navies should be maintained, although these powers are expressly confided by the Constitution, not to the President, but to Congress; that, under this vote, the President might build ships, or buy ships, or levy troops, or do any thing which he might choose to think that the military service required.

I endeavored to show that this mode of proceeding was, in no just sense, an *appropriation* of money; that it appeared rather to be a surrender of our own powers and our own duties to Executive discretion; that it was against fundamental principles, and the whole spirit of the Constitution; that it was a dangerous inroad on the Constitution, as it vested every power, great and small, respecting the military and naval service, in the President alone, without specification of object or limitation of purpose, and to the exclusion of the exercise of all judgment on the part of Congress.

Holding this opinion of the proposed grant, fully believing it to be repugnant to plain constitutional injunctions, and a most alarming extension of the Executive authority, I declared that I could not agree in it; and added these remarks: *The honorable member from Ohio, near me, has said that, if the enemy had been on our shores, he would not have agreed to this vote. And I say, if the proposition were now before us, and the guns of the enemy were battering against the walls of the Capitol, I would not agree to it.*

The people of this country have an interest, a property, an inheritance, in this instrument, against the value of which forty capitol's do not weigh the twentieth part of one poor scruple. There can never be any necessity for such proceedings but a feigned and false necessity, a mere idle and hollow pretence of necessity; least of all can it be said that any such necessity actually existed on the 3d of March. There was no enemy on our shores; there were no guns pointed against the Capitol; we were in no war, nor was

there a reasonable probability that we should have war, unless we made it ourselves.

Now, sir, whether I was right or wrong in my judgment of the true character of the proposed grant, no man, of common intelligence and common candor, can infer any thing from these remarks of mine but a conviction on my part of the great impropriety of the grant, a full belief that it was inconsistent with constitutional provisions, and a fixed resolution to prefer the safety and integrity of the Constitution to every political interest. I had only repeated, in other language, the sentiment of the gentleman from Ohio, to which nobody had thought of taking any exception.

Gentlemen might say I was mistaken; that the proposed vote did not violate constitutional provisions; that it did not dangerously extend Executive power and discretion; all this gentlemen might say, and, undoubtedly, those gentlemen did so think who agreed to the vote themselves.

But there is no member of the Senate who will say that, if he himself had honestly entertained the opinion which I expressed, he would have supported the grant, either to save the Capitol or to preserve any other public interest.

No gentleman can say so, without admitting that he regards the integrity of the Constitution as a subordinate matter, a thing which may be surrendered in a political emergency like that of war and invasion. Every man must see that my expression was merely one of preference for the Constitution of the country over all other interests, and its preservation an object so vital, so paramount, in my judgment and feeling, as not to be hazarded in any emergency, real or pretended. This, sir, every man must see to have been my meaning, and my only meaning, and, if he is an honest man, he must acknowledge and admit it.

Sir, if I am guilty of idolatry toward any object on earth, it must be found in the homage I bear to the Constitution of the United States. I have been bred in the reverence and in the love of that Constitution. I think I have some knowledge of its history, its spirit, and its principles; but, however that may be, I am sure I have ample knowledge of its blessings in the prosperity which it has spread around us all at home, and in

An Unpublished Speech

III

the national distinction which, under its fortunate star and beneficent guidance, we have attained abroad. These are the grounds of my attachment to it.

It is not, sir, that this Constitution, or the Government established under it, has ever enriched or particularly benefited me or mine. I have never held an office, unless it be an office to represent the people in one or the other branch of this Legislature. I have received no favors, and asked no favors, at any time, or from any hand. Not one of those in whose veins there runs a drop of blood kindred to my own has enjoyed office, or profit, or patronage, or favor of any kind, under this Government.

I have, sir, devoted no small labor, I have given the best years of my life, I have sacrificed professional emolument, and I have done all this cheerfully, for the honor of serving the people in Congress, with no other object than to secure their favor and confidence, and a desire, I hope not too ambitious, of being numbered among those who have done something, in their day and generation, to uphold the free institutions of the country, and to maintain the bond of our happy and glorious Union.

With this unaffected attachment to the Constitution, with this sedulous care for it, with a habit, I confess, which leads me, on every great measure, and especially on every new and extraordinary proposition, to consider, first and mainly, its bearing on that great security for our liberties and our Union, I saw a grant of money to the Executive proposed at the last session, which I thought inconsistent with its fundamental provisions, and *dangerous* to its permanent safety. So thinking, I said in my place, the other day, that I could not have voted for it if the enemy were battering against the Capitol! And, so thinking, could I so vote, even in that state of things? Could any honest man, holding my sentiments, so vote, in that or any other emergency?

The Supreme Court

MARCH 1, 1836.¹

THE Judges of the Supreme Court adjourned their session on Friday last. It is the shortest session which we remember. We have been furnished, however, with an account of the causes heard and decided, which shows, that however short, it has proved efficient for the despatch of judicial business. The whole number of causes on the Docket was one hundred and seven. The Docket was gone through with three several times according to the rules of the Court; and every cause was heard which was ready for argument. Every cause argued was decided. Forty-six written opinions were delivered by the Court, besides several oral judgments. The whole number of causes finally disposed of was sixty-five. Of the continued causes, twenty-five are suits of the Commonwealth Bank of Kentucky, in which the sole question is supposed to be whether that Institution was constitutionally created. One decision, of course, will settle all these cases. Three others of the continued causes involve constitutional questions, two of which have been ordered for a second argument: these cases, involving constitutional questions, were postponed for a full Court.

Mr. Justice Story, as senior Justice, presided during the term; and we have heard from members of the Bar and others ample commendation of the ability and urbanity, with which he discharged the duties of his situation. The Central Chair, so long filled by the illustrious Chief Justice Marshall, stood vacant, during the session. The effect of this appeared to us to be striking. Accustomed, for more than thirty years, to see his venerable form in the midst of his judicial associates, we

¹ From the National Intelligencer, March 1, 1836. The original manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch.

could not behold his seat vacant, from the beginning to the end of the term, without the recurrence of sober and solemn feeling.

Our readers will remember that a Bill has passed the Senate, we believe nearly unanimously, for the reorganization of the judicial system, so far as is necessary in order to extend the Circuit Courts to all the States in the Union. The Western States have long and earnestly insisted on this extension, and we sincerely hope that what seems so just and equal may be accomplished. More than all, however, our desires and prayers are fervent, that the character, usefulness, and dignity of this high tribunal may be long preserved.

Results of the Session

MARCH 6, 1837.¹

THE second session of the Twenty-fourth Congress has closed. Both Houses contained an admitted and strong majority of friends of the Administration, and the complaint, or the excuse, of last year, that at least in one branch the composition of the committees was unfavorable to the success of Administration measures, has had no foundation. The committees were all framed with undeviating regard to the strictest injunctions of party discipline.

With such majorities, and with committees so composed, What has Congress done at this Session?

In more than thirty years of acquaintance with Congress, we have never known a session so barren in valuable results. With great difficulty, and at the very last moment, most (but not all) of the common appropriation bills, it is true, were got through. So that the machinery of Government will go on. And this short sentence describes almost the whole of the actual doings of the session, if we except the bill for increasing the number of the Judges of the Supreme Court by adding two members to that body.

Congress has not reduced the revenue, the leading object presented to its consideration in the President's message at the opening of the session. It has not reduced the duties on importations; nor has it restrained the sales of the public lands.

The Treasury Order (the Specie Circular) of July 11th, 1836, so much, so universally, and so justly complained of, is not

¹ Printed in the National Intelligencer. In a letter to Mr. Hiram Ketchum, dated March 4, 1837, referring to "the loss of the Bill restoring duties on burned goods & that for anticipating payment of the French Indemnities," Mr. Webster says: "What I think on these subjects (as well as some others) you may learn by looking at the Editorial Article which will be in the Nat. Intell. on Monday."

rescinded, repealed, or superseded. Both Houses, it is true, by very large majorities, passed an act, rescinding and superseding this obnoxious order; but the President neither approved it nor negatived it. He put it in his pocket. It was presented to him some days before the adjournment; but these days not being ten, he had a right, as he construes the Constitution, to do neither one thing nor another. He did not even inform the Senate, with whom the bill originated, that he had not time to consider the bill. He had, doubtless, abundant time; but, as the bill had passed both Houses by more than two-thirds of each, he probably foresaw, that if he returned the bill, with his objections, it would still be passed by the constitutional majority, and so become a law, without his consent. He chose, therefore, to hold it back from all further proceeding or action of Congress, and in that way to defeat it. We hold this to be the most exceptional of all the modes of exercising the veto power, because it is the least responsible, and because it deprives Congress of an opportunity of exercising its constitutional authority of passing a law by the votes of two-thirds of each House, without the consent, or against the will, of the President. On this occasion, the strongly expressed, undoubted, and notorious will of much more than two-thirds of both Houses has been knowingly and intentionally disregarded. The will of one man has triumphed over the will of the People. This is the unquestionable and unquestioned fact; and we leave commentary to others, or to another occasion.

In speaking of the measures which have failed, we must not be understood, in all cases, as manifesting our approbation of the measures themselves. We only say that, with all its majorities, and all its power, the Administration has failed, completely failed, to fulfil the purposes which it undertook to accomplish. It has found itself just able, and only just able, and that indeed not without the help of the Opposition, to keep the Government along. If that Opposition had been less patriotic, if it had sought to create embarrassment, if it had either withdrawn or voted against measures, we see nothing but that Government must have come to a full stop.

The Fortification bill has been lost by a disagreement between the two Houses. We do not mean Mr. Benton's bill

for new works; that never breathed a breath (some people think it did not deserve breathing-time) after it reached the House of Representatives. But we speak of the common, annual appropriation for works already begun, and now in progress. This appropriation has failed, by the disagreement of the Administration House of Representatives and Administration Senate, on the subject of the distribution of the Treasury surplus, a measure which was connected with the bill making this appropriation; so that all the works, where prior appropriations are exhausted, must await the provisions of the next Congress. And this leads us to say that, while Congress has adopted no measure to reduce income, it has refused to make distribution of a large and clearly ascertained surplus; we say ascertained, because, as was urged in both Houses, it is now as obvious that there will be a surplus next January, as it was, on the 2d of July last, when the late act passed, that there would be a surplus the 1st of January of this year. The land bill not passing, the bill for reducing duties not passing, another surplus is a thing of course. It may not be as large as last January, but we regard it as being equally certain. This surplus Congress refuses to deposit with the States. It ordains, on the contrary, in effect, that it remain with the deposit banks. The House of Representatives insisted on distribution, if there should be surplus, and would not yield the point; the Administration Senators refused to assent to distribution, let the surplus be what it might. The final vote in the Senate against it was 27 to 23. So the Fortification bill, Distribution section and all, was added to the list of lost measures.

The commercial community earnestly desired the passage of the bill anticipating the payment of the remaining instalments expected soon to be received at the Treasury under the treaties with France and Naples. At the present moment, such a measure was looked for as one that would afford considerable relief to the pressure for money. The bill passed the Senate, but was lost in the House.

Then the bill for restoring the duties on goods destroyed by the great fire in New York — a measure of obvious justice to individuals, and, from its extent and importance, deserving to be regarded as a public measure — passed the Senate also, but

partook of the fate of so many of its companions, and failed in the House.

The retaining this money in the Treasury we are compelled to regard as a harsh and cruel exaction. We know no justification, hardly any plausible apology, for it; and while we speak of the restoration of these duties as one act of justice, we cannot but refer to another, and that is, the claims of our citizens for French spoliation before 1800. These two claims of justice, absolute justice, as we consider them, would have absorbed ten millions of the money of an overflowing Treasury. When will Governments learn that justice is the first and greatest element of all true public policy?

Among the other bills of a public nature which passed the Senate (and failed in the House of Representatives) was the bill for increasing the Military Establishment of the United States. Though this was a measure upon which there is a great diversity of opinion, it must be confessed to have been defeated by other circumstances than the hostility of the House to it.

The whole number of Senate bills not acted upon by the House was about one hundred and twenty; amongst which, as of the greatest general interest, we may instance, from an examination of the file of bills, those authorizing the relinquishment of the 16th. sections granted for the use of schools, and the entry of other lands in lieu thereof; to revive and continue in force the act "to provide for persons who were disabled by known wounds received in the Revolutionary war;" to provide for the erection and repair of custom-houses, (at Philadelphia and New Orleans;) to authorize the Ohio Railroad Company to locate a road through the public lands; to give effect to the 8th. article of the treaty of 1819 with Spain; to provide for the legal adjudication of the Bastrop, Maison Rouge, and other grants in Louisiana and Arkansas; a bill in amendment of the acts respecting the judicial system of the United States; a bill to authorize the President of the United States to furnish certain ordnance to the several States; the bill to rebuild the General Post Office Building, and for other purposes; the bill to provide for the transportation of the mails upon railroads, etc.

As one effect of the loose mode of doing business in Congress, we cannot but regret that among the lost bills is almost

every bill, sent by the Senate, for objects within the Territories of Florida and Wisconsin; which unkindness to these younger children of our Union we the more regret on account of the worthy Delegates from these Territories, whose estimable characters, and indefatigable exertions in getting them through the Senate, deserved better treatment from the House in which they sit. Nor less, certainly, do we regret that the liberal and enlightened intentions of the Senate to erect a Hospital in this city, and to establish a Criminal Court in this District, shared the same fate as the Territorial bills.

Of the private bills, not acted on, the number is large, we believe, beyond all former example. The number reported in the House of Representatives, and never acted upon in any manner, amounted to several hundred.

Such are the results of the session, as we hastily gather them.

Suggestion to Joel R. Poinsett on the Northeastern Boundary

MARCH 9, 1839.¹

1. THAT the negotiation should be opened, & considered throughout, in the most friendly spirit, treating all the arguments & suggestions of the Br: Negotiators with entire respect.

2. But that an immediate and final settlement of the question should be urgently pressed, upon considerations and motives, which address themselves equally to both parties.

3. That informal & friendly interviews should be sought, with the Br: Neg^{ts} & the members of Her M^t's Cabinet; which interviews should be carefully used, to accomplish the following purposes.

¹ In 1839, Joel R. Poinsett, a member of Mr. Van Buren's Cabinet, favored the appointment of Mr. Webster as a special minister to England, for the settlement of the Northeastern Boundary. The President doubted whether Mr. Webster's views were sufficiently pacific, and the latter thereupon called upon Mr. Poinsett and submitted the memorandum on the question here printed. "The germs of the negotiation which afterward led to the treaty of Washington were contained in this memorandum," says Mr. George Ticknor Curtis. The paper, supposed to have been lost, is printed from the original manuscript, in Mr. Webster's handwriting, now in the New Hampshire Historical Society.

The following memorandum, regarding the paper, is printed from the original, in Mr. Webster's handwriting, owned by Mr. Edwin W. Sanborn:

MAR. 10, [1839].

I happened to hear, near the close of the Session, that Mr. Poinsett had expressed, in the presence of the Pres't, an opinion favorable to sending me on the Special mission to England.

I heard it intimated, also, ab't the same time, that the President might think my notions too much inclined to a *war* aspect.

I therefore called on Mr. P. — told him what I had heard, & said that I wished to say a few words to him, expressive of my opinion of the course the minister ought to pursue merely for the purpose of justifying his favorable opinion. I read to him this memorandum. He expressed himself as pleased with the suggestion, in general, and asked me for a copy; which I sent him on the 9 Mar.

1. To satisfy the English agents & the English Gov^t of the intrinsic weakness of their case, upon the orig^l question, under the Treaty of 1783.

To satisfy them as far as possible, that they overrate the importance of this territory to England : to suggest that England cannot feel anxious for it, merely as so much land, since in the Province of New Brunswick land now is, & for many years to come must be, out of all proportion to population : and that as affording a better communication between Halifax & Canada, it is to be considered that no great communication, by land, between those points can exist, under any circumstances ; or at least not for half a century ; that England can seldom have occasion to move troops, on that route ; that if she sometimes have such occasion, there will be no objection to it, in time of peace, although the U. S. should own the land ; and that, in time of war, we should prevent such a movement, if we could, whether she, or we, owned the territory. Perhaps, in this connexion, a r^ght of passage, might be thought of, as fit to be made a Treaty Stipulation.

I imagine however, that it is not merely a communication from Province to Province that England desires, so much as it is a general strengthening of her frontier, by widening its breadth, East of the S^t Lawrence, at this point, and giving compactness & continuity to her possessions.

4. To take an early opportunity, in the formal correspondence, of presenting a clear & concise view of the merits of the original question. The papers submitted to the Dutch Arbitrator are learned & able, but very prolix. A close, connected & condensed argument, on this original question would not be amiss, if the course of correspondence should seem to make a place for it.

5. To bring England to take her ground ; either, that she asserts a line conformable, as she alleges, to the Treaty, as she did before the Dutch Arbitrator ; or, that she insists, that the description in the Treaty is so indefinite, that the boundary cannot be found, by any attempt to pursue its requisitions.

6. If she shall take the first course, & set up such a line as heretofore, show how utterly impossible it is to reconcile that line to the plain & clear demands of the Treaty.

7. If she adopt the latter branch of the alternative and insist

that the Treaty line cannot be found, controvert this by the arguments, appropriate to the case & showing, among other things, that ridges or heights of land, are not of unfrequent use, in fixing lines, on this continent; that the English Govt has, in other cases, prescribed such boundaries; that the U. S. have done the same thing, in many treaties; without practical inconvenience, & then urge as an important matter of fact the actual result of the late survey under the authority of Maine.

8. But however the argument may stand, it is probable that England will not, gratuitously, yield her pretensions; & something must be yielded, by us, since the subject has actually become matter of negotiation. A Conventional line, therefore, is to be regarded as a leading & most promising mode of adjustment. With a view to this, — before he leaves the country, should have an interview with the Gov^t of Maine, & her Delegation in Congress. He & they should examine the map carefully, & consider the whole subject maturely, & they should be called on to say *what* Conventional line Maine would approve. This interview might be had without form, or announcement; but it would take time, & should be done as soon as convenient. If a Conventional line should be agreed on, in London, it should be one of the conditions of the Convention, that the Pres^{ts} ratification should be postponed here, till Maine had given her consent; & that Her Majesty's ratification should be postponed, till ratification should be made in U. S.

9. To the suggestion that this Territory cannot be of much importance to Great Britain, (which suggestion should only be made in informal conversations) her negotiators would doubtless reply, that, if so, neither could it be of much importance to the U. S. — This would furnish a suitable opportunity to explain the nature of our political Institutions, the limited authority of the Gen^l Gov^t, the natural tenacity with which a State clings to what it considers its rights of soil &c &c.; & to suggest that for these & similar reasons, the desire for peace, which is really felt by the Cabinet of W. ought not to be measured precisely by what it feels itself authorized to propose, &c &c.

10. In the informal conversations which may take place, suggest & urge strongly the great expense, & perhaps the serious difficulty, to both Governments, of preserving quiet, along the

whole line of frontier, thro' another winter, if this controversy be not settled, or some progress made in its adjustment.

11. If a Conventional line cannot be agreed on, propose a joint Commission of survey &c, of two Commrs on a side, who *if they can agree*, shall ascertain the Treaty line, & mark it definitely. But this to be without an umpirage.

12. If this be not agreed, propose, that each party shall, by itself, appoint a Commission of survey, to ascertain the fact, whether the Treaty line can be ascertained or not; that these Commissions shall act separately; that they shall perform the duty as early as possible; that Each Commission report to its own Government; & copies to be interchanged, the reports to be made by Nov^r & the negotiation, meanwhile, adjourned, & transferred to Washington. I suppose, however, that if this course were agreed to, the survey could not be accomplished the ensuing Summer; as the British Ministry will probably be very much engaged until the close of the Session of Parliament, which will probably not terminate before August; & it may [be] doubtful whether, earlier than that time, any thing could be agreed on.

13. If nothing else can be done, another reference, or a joint Commission with an umpirage, is to be thought of. This however, to be the last resort, unless U. S. Gov^t be already committed on this point.

14. Finally, that if an agreement cannot be arrived at, in some of these modes, or in some other which may be suggested, the negotiation be broken off, with an expression of deep regret & an intimation that the Gov^t of U. S. fully believing in the easy practical ascertainment of the Treaty Boundary, will cause a careful & accurate survey to be made, by a Commission of high character, appointed by itself, & acting under oath, with authority to explore the country, & following the terms of the treaty ascertain the Boundary, that in the spirit of amity, it will communicate the result of this survey to the British Gov^t, expressing, at the same time, its own sense, of what the case, as it shall then be presented, shall demand.

Papers on the United States Bank

Remarks on the Fiscal Bank

JUNE 15, 1841.¹

BEFORE offering a few remarks more at large on the plan of the Secretary of the Treasury, for a bank of the United States, it may be proper to recur to the general history of the country, for some time past, in regard to the currency, and to state its present condition.

In 1832, President Jackson negatived the bill for continuing the charter of the Bank of the United States; and in September, 1833, now nearly nine years ago, President Jackson, through the instrumentality of the Secretary of the Treasury, removed the public moneys from their then existing lawful deposit. From that moment to this, the currency of the country has been thoroughly deranged. This none can deny. Even if the cause may be disputed, the *fact* cannot. Those who so please may ascribe the deplorable state of things which has been brought upon us, and which still continues, to the multiplication of State banks between 1832 and 1836, to a spirit of speculation which seized upon the Public, to the mal-administration of the late Bank of the United States, after it had ceased to be a national institution, or to other causes; thus opening the inquiry whether, supposing that these causes, or any of them, ought now to be regarded as the immediate productive agents of this mass of public evil, they are not themselves derivative and secondary, all owing their existence and their power of mischief to the original acts of the Executive Government.

¹ This article and the two which follow were published in the *National Intelligencer*. The manuscripts, in Mr. Webster's handwriting, are in the New York Public Library, Lenox Branch.

Without discussing any of these questions, it is enough to say, that, since 1833, the currency, the exchanges, and the general moneyed affairs of the country have been such as greatly to impair the public prosperity. This notorious and lamentable truth is the first element to be regarded in the consideration of the subject.

In the next place, it is true and notorious that the successive plans for relief and remedy, which the Government has prepared and adopted since 1833, have all signally failed, and have only led great and important public interests, day by day, from a bad condition to a worse condition; till, at this moment, the local banks over three-quarters of the country are in a state of suspension, all the circulating paper over the same space greatly depreciated, and much of it worth hardly more than fifty cents in the dollar.

The next great and notorious fact is, that the policy of the Government, in relation to the currency, has been the main topic of dispute between political parties, and that, on this point, chiefly, the contest of 1840 turned; and the result of that contest has fully shown that a vast majority of the People rejects and repudiates all the doctrines, all the schemes, and all the experiments, of the last two Administrations.

A new Administration has now come into power, and a new Congress is assembled, for the great purpose of reforming this state of things, and endeavoring to restore the public prosperity by placing the revenue, the currency, and the finances of the country on a proper footing.

As might have been reasonably expected, those who compose the Administration, and the majority of the two Houses, while all agreeing in the necessity of adopting immediately some efficient measures, are not, perhaps, entirely of the same opinion as to any particular measure, or modification of measure. On the subject of a Bank, especially, it is well known there has existed much difference of opinion among those who have acted together most cordially in opposing and overthrowing the policy of the preceding Administrations. The sentiments of the President, for instance, as they have been well known, and constantly maintained, for the last fifteen years, are not, in all respects, such as the Secretary of the Treasury and other mem-

bers of the Cabinet are equally well known to have entertained and expressed. These differences chiefly respect the extent of the constitutional authority of Congress in the creation of a Bank, and clothing it with powers.

What, then, is the line of duty naturally recommending itself to those who, with these differences of opinion, find themselves called on to discharge high obligations to the country? Is it their duty to beat the field of constitutional argument all over again, in the vain hope of coming to a perfect unity of opinion on all particulars in the end? Is it not rather to consider how far they differ, and how far they agree, and to inquire, with candor and honesty, whether that on which they do agree may not be made efficient for relieving the country?

It is in the spirit of this last proposition that the Administration appears to have acted. The particular plan before Congress, on the call of the Senate, and which is now submitted to the wisdom of the two Houses, is the plan of the Secretary of the Treasury; but it is reasonable to suppose that it has been considered, and its general outline approved, by others.

It may be presumed, then, that it is the opinion of those connected with the Executive Administration, that such a bank as is proposed will be useful and efficient as a fiscal agent of Government, and beneficial also to the exchange and currency of the country. That it does not contain all the provisions which some would have wished, is very probable; but the objections to it, whatever they may be, are of this negative kind. It may be taken for granted that there is nothing in it which those who have concurred in it regard as positively hurtful. And while some might be of opinion that, with other provisions, it would be more efficient, yet the question naturally presenting itself was, is it not best for the country that we go on, in this measure, just so far as we can go cordially together, and stop there? Is it not best to have a measure before us, which all, without the violation of any principle, or any consistency, may unite in supporting? Shall we propose something in which friends can agree, or shall we propose that which some of these friends cannot support, and thus by division throw ourselves at once into the power of the common adversary?

Poorly, poorly indeed ! would the party now in power fulfil the high expectations entertained by the country, if they should not, with a seriousness becoming the solemn crisis of the country, lay aside the pride of private opinion, give up personal predilections, and with singleness of heart, and under a full sense of the responsibility which rests upon themselves, unite their counsels fairly and cordially, and make a vigorous effort to relieve the country.

That this has been the governing motive in preparing the plan now laid before Congress, there is no doubt. That it will be the governing motive with the Whigs in both Houses, there is no doubt ; because they must know that they act in the presence of disappointed and eager adversaries, whose eyes are keen to discern party advantages, and who will be ready at the show of disorder or division in the ranks of the Whigs, to break in upon them, as squadrons of well-trained cavalry break in upon and overthrow the column, however great, which exhibits a broken line, or an opening for attack. The only security for the Whigs is coolness in action, and the compactness of the Hollow Square.

On the Proposed Fiscal Bank

JUNE 16, 1841.

THE new Bank is proposed to be established in the city of Washington. Most of the friends of a Bank, naturally looking to the institutions of that kind which have heretofore existed as models, expected it to have its locality in one of the large cities of the North. The first Bank was placed in Philadelphia, a city which at that time had the double advantage of being the wealthiest commercial city of the Union, and of being also selected as the seat of the Government for the next year. Five and twenty years afterwards, when the second Bank was incorporated, it was thought advisable to give it the same location, although the seat of the Government had been for ten years established at Washington. That there are advantages for the administration of such an institution, in great

commercial cities, which are not to be found elsewhere, is certain. The daily and hourly intercourse of its governors and directors with commercial men; the greater facility in noting every change, and shade of change, in the condition of the money market; the presence of other well-conducted institutions; the benefit of being in the very centre of foreign commerce and foreign correspondence — all these, it must be admitted, are great aids in keeping the judgment of men well informed while conducting an institution the operations of which require such an intelligent and careful oversight.

On the other hand, for such an institution as is *now* proposed, there are reasons of no small weight for desiring its locality to be at the seat of Government. The main character of the new institution is that of a fiscal agent; an institution, that is to say, which is expected to be useful to Government in the collection, safe-keeping, and disbursement of the revenue. Its proximity to the operations of Government is, therefore, of itself some degree of advantage. But there is another and yet more important view of the question. It is not to be denied that, in the discontinuance of the late Bank of the United States, and in the popular support which followed that measure, ignorance and prejudice had a powerful agency. Loud clamors against monopolies; ceaseless railings against the secret operations of a monstrous moneyed institution; cries, enough to rend the Heavens, against a corporation which was represented as a master over the Government, and as standing up with authority to overawe and put down the Representatives of the People, were the modes of political discussion which have brought the country to its present condition. These forms of argument may be resorted to again, for there will always be some degree of ignorance and prejudice in the community, especially on such subjects, and there will always be demagogues who have neither principle nor self-respect sufficient to restrain them from turning these elements to their own profit. We take it for granted that samples of this way of discussing questions of finance and currency will be exhibited before our eyes while the question of creating the institution itself is going on.

As one means of counteracting these evils, and of defeating

the designs of that low selfishness which founds its hopes on alarming the prejudices and passions of the People, the Bank is to be established here — here, in the very presence of the Representatives of the People — its proceedings to be made public, and every week, or every day, indeed, capable of being examined and scrutinized by those who are entrusted with the government of the country. The Executive Government is to have no power of control over it, or of interference with it. But to Congress, to the Representatives of the People and of the States, it is to be constantly accountable, and here it is to be, in the midst of them, conscious of their presence, and inviting their examination. Clamor is most easily raised and groundless fears excited against whatever is distant and unknown. The best way to allay the fright of children who think they have seen a ghost, is to lead them up and show them that it is not a ghost. And the best way to put down the power of demagogues, who cry out that *they* see a monster, which the People do not see, is to give the People an opportunity to look also.

This object, as far as it is capable of being attained at all, is to be attained by placing the Institution here, in the centre of the country, and at the Seat of Government, where public men and others may become acquainted with its operations, and watch its purposes.

One cannot but think how much would have been lost of that rare eloquence which has for so many years at least stunned, if it has not delighted, the ears of its auditors with exclamations against monsters, if the object denounced had been concealed neither by secrecy nor distance, but had existed before the eyes of these auditors, and subject to their inspection, and inviting their examination.

But while the general control of the institution is to be here, its principal moneyed operations must doubtless be conducted in the cities of the North, the South, and the West. Among all these its capital will be distributed, and in them all its business of discount, exchange and collection will be carried on. The officers at these places will of course possess the same means of mercantile knowledge as the most intelligent of the local institutions; thus uniting the largest and

most accurate practical knowledge with the advantages of a comprehensive and wise general superintendence. It is not altogether unimportant to add that, while between the great cities of the North there might be rivalry and competition, sometimes even assuming the character of jealousy and dislike, none can be either envious or jealous of our humble city of Washington, and each will see that, by placing the general direction here, none of the large rival cities is to enjoy over its neighbors the great advantage of having the establishment of the institution within its own walls, and the distribution of its capital in a great degree subject to its own discretion.

The value of the foregoing remarks may be differently estimated by different persons; but there remains another, to which all must attach importance. The Bank *can* be established in the District of Columbia; it is *doubtful* whether it could be established elsewhere. It is of little use to discuss the constitutional question. The question does exist. It exists between friends, conscientious and patriotic friends, who, if they cannot convince one another, do not revile one another, but, feeling how much is expected from their joint counsels, make it matter of sacred duty to agree, so far as they can agree, and not to disappoint the best hopes of the country, by pertinacity to particular opinions. Congress may make a Bank which shall not entirely satisfy all the Whigs; but if it should not make *some* Bank, it will be sure to *dissatisfy all*. The country will pardon those in power for not doing what they cannot do; but it will not pardon them for weakening their power by *disunion*. That fault, one may almost say that crime, will certainly not be held excusable.

The Proposed Fiscal Bank

JUNE 17, 1841.

THE plan submitted by the Secretary of the Treasury proposes that branches of the Bank, or offices of discount and deposit, may be established in the several States, *with the assent of the States*.

Objections are likely to be raised to this provision of the bill by some of those who are, generally, in favor of a National Institution. These objections will probably be, first, that the making of the assent of the States necessary to the establishment of branches, surrenders, by implication, an important power of the Government; and, second, that it is doubtful whether the States will assent, and, if they should not, the whole measure would essentially fail.

Let these questions, which are admitted to be important, be considered with candor. Under the present circumstances, he is not wise who hastens to either of these, from the mere impulse of preconceived opinion.

On the first point, it must be admitted that the practice of the Government is against the Secretary's proposition. The two former Banks were authorized to establish branches within the States, without the assent of such States. The power has thus been asserted, repeatedly, by Congress, and its exercise by Congress has been sanctioned by the highest judicial tribunal. It is not now proposed to declare that the power does not exist; it is only proposed not now to exercise it; and therefore the true question, in this case, is, how far mere non-user is equivalent to surrender.

It is notorious that there are those who doubt the power, and always have doubted it. They doubt, against repeated decisions of all branches of the Government, and they will continue to doubt, if all these branches should renew their decisions.

The fair implication, therefore, arising from the omission to exercise the power, on this occasion, goes no further than the well-known fact. From not exercising the power, (if it is believed to be useful,) the true inference is only that it is a doubtful, or a doubted, power; and it is no new thing, especially in our system, to forbear exercising an authority which is doubted, and which is not considered as indispensable.

Our legislation is full of instances of such forbearance, and of subsequent exercise of the power from necessity. These instances need not be enumerated. They will occur to every man familiar with the statute-book. So that, if it should be deemed necessary, a year hence, to exercise the power now

forborne to be exercised, the argument, so far as it depended on matters of historical fact, would stand thus: Those who should be against the power would say, "It was not granted in the original law, and therefore the inference is, that Congress did not suppose it to exist;" and to this it would be answered, "The power has been repeatedly exercised, in times past, but, being doubted by some, and deemed not essential, was not inserted in this law; but subsequent events have shown that it is essential, and therefore the question comes back upon its original ground, and upon former precedents." That there may be *some degree* of implication against the power, from omitting its exercise in the proposed plan of the Secretary, may be admitted; but it cannot be said, on the other hand, that anything more is implied than is notoriously true, or that the omission amounts to a *surrender* of an important principle of the Constitution.

It is undoubtedly the true theory, in our systems of government, to regard each as independent of the other, revolving in its own orbit, performing its own duties, and fulfilling its own purposes, without either aid or obstruction. This is the theory, and although all constitutional provisions do not entirely coincide with it, the public good requires that it should be observed, as far as possible. But, as has now been intimated, there are exceptions. There are things which the States may do, with the assent of Congress, and other things which Congress may do, with the assent of the States. What is now proposed, therefore, is not altogether an anomaly.

On the whole, it is not clear that the passing of this bill, in either form, would change the posture of the constitutional question, or affect the strength of either side of it. If the provision of the bill requiring the assent of the States should be struck out, and the bill should pass in that form, it would only reaffirm what has been repeatedly decided, but leaving just as many doubts as exist now; and, if it should pass with the provision in, none of those who suppose that Congress may establish branches without the consent of the States will have changed their opinion.

The second question is the important and practical one: is it likely that any, or many, of the States, will refuse their assent?

Those who recommend the measure in its present shape have no fears on this head. That same public opinion which shall carry the measure through Congress will ensure the assent of the States. What State will find its interest in refusing it assent? In such an inquiry, we naturally look first to the large commercial States, and first of all to New York. Will New York refuse her assent? There will be offered to her great city a branch, with a very large assignment of capital, to be managed by those among the most discreet and skilful in such things of her own citizens. Will she refuse it? Boston is but twelve hours beyond her. That city, distinguished for noiseless enterprise and far-seeing sagacity, and already in the possession of such advantages and making such steps of progress as render her no contemptible rival of her great sister, will be quite ready to take what she rejects. If New York prefers that the "centralization" of which so much was said some time ago, should be broken up, and another orb formed of large magnitude, though still less than herself, to which, as their centre, a great proportion of the commercial and moneyed affairs of the country should hereafter tend, it is not probable that Boston would excite herself into any strenuous or heated opposition to such a course of things. Philadelphia is but six hours from New York, and there is little reason to suppose that the offer of a branch with something more than her just proportion of the capital would be disagreeable, either to her or to the State of Pennsylvania. Nor would the State of New Jersey think it any disrespect to her Broad Seal if she were offered a branch, with a large capital, at Jersey City, where the "Fiscal Agent," not admitted into the City of New York, could very conveniently discharge its functions. We may look to the South and ask whether Virginia or South Carolina, States in one of which opinion is adverse to a Bank, and in the other divided, prefer, after all, that their parts should go to Maryland and North Carolina. If the principles of Alabama lead her to refuse, Louisiana would sooner submit to the burden of taking what might properly belong to both States, than to see the measure fail. We may expect, perhaps, that the stern sentiment of Missouri will hardly relent, and know not what course Illinois might think it her interest to pursue.

But a specie paying bank, with a handsome capital, and furnishing the country with a perfectly sound currency, is not likely to be regarded as a great evil by Ohio, Indiana, and Michigan.

There is no doubt that the States, with one or two exceptions, perhaps, for the present, and with no exceptions in a short time, will readily give the necessary assent. Indeed, the practical difficulty will be on the other side. The danger is that more branches will be applied for, both by States and individuals, than it will be convenient or perhaps safe for the institution to establish.

The English Mission

JULY 15, 1841.¹

WE are authorized to say that the President, some time ago, tendered the important trust of the Mission to England to the Hon. John Sergeant, the distinguished Member of Congress from the City of Philadelphia.

Having held the offer under consideration, Mr. Sergeant, we regret to learn, with just acknowledgment of the honor of the proposed high public employment, and of his grateful respect for such a mark of confidence, felt himself obliged to decline the appointment. So far as we may gather from rumor, the reasons for this were of a private nature, such as might properly influence the head of a large family, and one who, it is probable, had participated in that diminution of income, from vested property, which the convulsions of recent times have rendered so general. Mr. Sergeant is well known to the whole country. His service in Congress has already been unusually long, most useful to the country, and, as we believe, in the highest degree acceptable to his constituents. There are many eminent citizens from among whom, without doubt, a highly fit selection may be made for Minister to London, but it will be rare good fortune if the Executive choice should fall on any one in whose integrity, ability, prudence, and American feeling, the American People would have more confidence than in those of John Sergeant, of Pennsylvania.

¹ Printed in the *National Intelligencer*. The manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch.

President Tyler's Veto of the United States Bank Bill

AUGUST 16, 1841.¹

AN article for tomorrow —

announcing Veto —

— sh^d. be cons^d. calmly, & dispassionately — well weighed & examined.

We (Editors) belong to the whole Whig Party — & no section.

We wish to maintain its counsels &c —

What is to be done? — no good can come from violence & outbreak — excitable minds might make a mistake, in this particular — such a course would weaken, disunite, & finally destroy the Whig party, & with it the best hopes of the Country.

Such a catastrophe be allowed to follow the Veto — ?

The President, no doubt, has acted from pure & conscientious motives. His conduct, we are well assured, throughout the whole consideration of the subject, has been frank, courteous, & perfectly satisfactory to every member of his Cabinet, & to all others with whom he has held communication.

We think, therefore, that there is no cause, in what has happened, to weaken the confidence of the Whig Party in President Tyler. He is a Whig, attached to all the great principles of the party, & endeavoring to carry them out, fully & honestly — He knows that nothing else can restore the prosperity of the Country.

¹ From a manuscript, in Mr. Webster's handwriting, in the New York Public Library, Lenox Branch. It begins with a number of notes or headings, but after the thirteenth line proceeds more connectedly. A long editorial article, entitled "The Veto," written from the suggestions in this manuscript, appeared in the National Intelligencer, August 17, 1841.

We may gather from the message itself that he is now ready to sanction a Bank, such as shall adapt itself to the real wants of the Country.

We trust, therefore, that candor & patriotism will be the Whig spirit of the occasion, & that Congress will not only carry out all its other great measures, but make a further trial for a Bank, at this session. Possibly it may not be accomplished till next winter, but we think it worth a trial. The House of Representatives has shown how much important work may be done, in a short time — Let it try its hand on this subject.

Let union & confidence animate the party — & above all let not the miscarriage of a single measure defeat the high raised hopes of the Country, in regard to others.

Papers at a distance make themselves busy with expected resignations in the Cabinet. We give no heed to such gossip. Why should the Cabinet resign? They have, we presume, given the President their honest advice; he has rec^d. it respectfully & kindly, & if he feels bound by his own Constitutional opinions to decide ag^t it, we see not any ground of resignation on that account. The power of approving & disapproving Bills is one which is peculiarly attached to the office of the President, himself; it is hardly an administrative matter; & our old fashioned notions are such, that we should no more think of any right in the Cabinet to control the President in this matter, so exclusively his own, than we should of embracing the other heresy, which we took some pains yesterday to expose, which would make him the author of every thing done by one of the Heads of Administration, & responsible for it, &c. &c.

The Resignations from President Tyler's Cabinet

SEPTEMBER 24, 1841.¹

It is plain enough, that the retiring members take the President at great disadvantage.

They write him letters, which they know he cannot answer, because the President of the U. States cannot enter into such a correspondence. They use weapons, therefore, which they know *he* cannot use.

In the next place, they undertake to state Cabinet conversations, which *he* regards as confidential, & to which *he* cannot refer, without violating his own sense of propriety & dignity. Having thus placed the President in a position, in which he cannot defend himself, they make war upon him, and this, we suppose will be called high-mindedness, & "chivalry!"

We should more readily incline to suppose there might be some reason for the retirement of the four members of the late Cabinet, if they could agree on such reason among themselves. But, unhappily, they entirely differ. Each has a ground of his own, & no sooner does one come forth to show his cause, than another follows with a different showing.

Mr. Ewing, who leads off, rejects the Veto, as ground of resignation, & goes out on "personal indignity."

Mr. Crittenden follows, & having no complaint to make of personal indignity, he goes out on the Veto.

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society. This paper was published in The Madisonian, September 25, 1841, substantially as Mr. Webster wrote it, but with a slight rearrangement. As published in The Madisonian, the paper begins with the fourth paragraph printed here, and the closing words of the last paragraph, — "the revealing of Cabinet secrets," &c, are followed, in The Madisonian, by an article, presumably the work of another hand, devoted to Mr. Webster's determination to remain in President Tyler's Cabinet.

Then comes Mr. Badger, who does not go out, on the Bank question, but because the case is one of "a measure, embraced, & then repudiated — efforts prompted, & then disowned, service rendered, & then treated with scorn & neglect."

That is to say, Mr. Badger resigns because the President trifled with his Cabinet.

But now hear Mr. Bell.

"Nor was it because the President thought proper to trifle with or mislead his Cabinet, as there is but too much reason to believe he intended to do, in the affair of the late Fiscal Bank that I resigned my place. There were other, & pre-existing causes for such a course, &c."

What these "other & pre-existing causes" are, or were, Mr. Bell does not inform us. In regard to these, the world is yet to be enlightened.

Placed in the shortest form Each Gentleman, with his cause of resignation, stands thus —

Mr. Ewing . . . personal indignity

Mr. Crittenden . . . Veto

Mr. Badger . . . trifling with the Cabinet

Mr. [Bell] . . . other & pre-existing causes.

Or the matter may be fairly represented, by stating each one of the several alleged causes, & seeing who concurred in it.

In that view, the case thus —

"Personal Indignity" —

assigned by Mr. Ewing; not alleged by any body else. —

"Veto." — assigned by Mr. Crittenden, expressly renounced by the rest.

"Trifling with the Cabinet" — the substance of Mr. Badger's ground; expressly repudiated by Mr. Bell, & alleged by nobody else.

"Other & pre-existing causes;" alleged by Mr. Bell, alluded to by nobody else, & of which the world is yet in utter ignorance.

We cannot suppose that these Gentlemen could have a weak affectation, each to give a separate reason for himself; and since they so entirely differ among themselves, we think the inference fair, that there was *no* plain, substantial cause, for breaking up the Cabinet, such as the public mind can readily understand & justify. Time will show what opinion the Country may

come to ; but of one thing we feel entirely confident, & that is, that when the passions of the moment shall have passed away, the revealing of Cabinet secrets for the purpose of attacking the President, is a proceeding which will meet with general condemnation.

A Message on the Tariff, prepared for President Tyler

1841.¹

THE reductions of the duties on imports, provided for by the act of Mar. 2, 1833, will all have taken place after the 30th day of June next. From that date, no duty will exist on any imported article exceeding 20 per centum, ad valorem; and the act declares that all such duties shall thereafterwards be paid in ready money, and shall be assessed upon the value thereof at the port where the same shall be entered, under such regulations as may be prescribed by law. The laws at present in force, laying ad valorem duties, make the cost in the foreign market the basis, on which such duties are to be calculated, making certain additions, however, to the amount of that cost. The legal effect of the Act of Mar. 2, 1833, is to repeal all these laws; so that unless Congress shall at its present session prescribe regulations for assessing the duties upon a valuation at the port of entry, or pass some law modifying the last mentioned act, no ad valorem duties can be further collected —

It is obvious, also, that the act of Mar. 1833 contemplates no other than ad valorem duties, in any case, whatever; because whether a specific duty, that is to say, a duty of so much per ton, or per cent, or per yard; within the limits, could not

¹ From the draft, in Mr. Webster's handwriting, in the New Hampshire Historical Society. It is endorsed "1842," but this is evidently a mistake. In the latter portion of the paper Mr. Webster, writing for President Tyler, refers to the Message as his first official communication to the two houses. The latter dealt with the question in his Message of December 7, 1841, and the date referred to by Mr. Webster, at which certain provisions of the act of March 2, 1833, were to terminate, was June 30, 1842. The paper was, therefore, undoubtedly written in 1841.

always be known ; since it would depend on the cost of the article, whether a specific duty exceeded the rate of 20 per cent ad valorem, & the fluctuations of price might carry a specified duty beyond the limit of 20 per cent tomorrow, although the same duty was within the limit today.

The act is peremptory, in two essential provisions ; 1st, that after June 30th all ad valorem duties shall be reduced to 20 per cent ; and, second, that the duties shall be assessed on a home valuation ; & it is not to be disguised that these two provisions bear to each other the nature of equivalents, or mutual considerations.

It would not be contended, as the undersigned supposes, that the Act of 1833 stands more free from the legal effect & operation of subsequent acts of Congress than any other law ; yet that there are very grave reasons, doubtless, why any modification of it which is esteemed necessary, should take place by general consent. It was proper at a time of considerable agitation, & conflict of opinion, & was the result of a spirit of conciliation & compromise. If experience, or a change of circumstances, shew the necessity of modifications, those modifications should be attempted in the full exercise of the same spirit. The maintenance of harmony & good will, & the general acquiescence & satisfaction of the people ought to be regarded as objects of great importance, in the imposition of all taxes. The undersigned feels himself bound frankly to declare his opinion to Congress, that sooner or later, the interests of all parts of the Country will be found to require some modifications of the act of 1833.

In support of this opinion, the undersigned suggests, in the first place, the great, if not the insurmountable difficulties, of establishing a home valuation at any port, without running the risk of producing such diversities, in the estimates of value, as shall not only lead to great practical inconvenience, but interfere, also, in effect, with constitutional provisions, that duties & imposts shall be equal in all the States.

In the second place, the undersigned cannot think it will ever be regarded as a wise policy, by any part of the Country, to augment the amount of revenue, if public exigencies should require such augmentation, by raising duties on all articles, in-

cluding those of absolute necessity, to the full extent of twenty per cent, pressing that limit, at the same time, as an absolute barrier against higher duties on all articles, even those of the merest luxury.

In the third place, the undersigned feels the strongest conviction, that looking to the security of the revenue, & the prevention of frauds, & especially on the supposition, which he believes to be well founded, of the impracticability of a home valuation, every reason of propriety & prudence requires that duties should be made specific, wherever from the nature of the subject they can be so framed. If in political economy, any thing is to be regarded as settled, either by the judgment of the best writers, or the practice of enlightened commercial Nations, it is the usefulness & importance of specification, & discrimination, in the imposition of duties of customs.

Finally, the undersigned will not conceal his opinion of the probable effect of the future operation of the act of 1833 upon the manufactures & general industry of the Country, particularly if no home valuation be established, & no equivalent found for the benefits intended by that provision.

The undersigned fully acknowledges that all duties & taxes are to be laid with primary reference to revenue, & the wants of the Government; he fully admits, too, that no more revenue should ever be raised than such as is necessary for the economical administration of the Govt; but within those limits, and as incidental to the raising of such revenue as is absolutely necessary, the undersigned entertains the fullest conviction that such discrimination may be made, & specific duties imposed in such manner, as that while no portion of the Country will suffer loss or inconvenience, a most beneficial degree of protection may be extended to the labor & industry of the Country. To produce this result, the undersigned thinks it only necessary to lay & collect duties in the usual & approved modes; to specify, where specification is practicable; to discriminate, where discrimination may be useful; & to reject arbitrary limits, & the idea of a forced & unnatural uniformity.

In expressing the opinions which the undersigned has thus the honor of submitting to Congress, in his first official com-

munication to the two Houses, he has proceeded under the influence of the fullest conviction & feeling that the whole Country, is one Country ; that the interests of its several parts, are not essentially adverse, — a truth, most triumphantly established, by the fact of the unparalleled growth & prosperity of all those parts, under the care & protection of one Government ; that of all nations upon earth, the United States are, in their variety of soil, climate, production & habit, most suited to benefit one another, not only by free internal intercourse, between such parts, but also by the establishment of uniform external relations ; & that therefore a policy which shall embrace the interests of all parts is the only true policy for the Government.

Slight local inconveniences may here & there be felt, under any system ; but, in general, a comprehensive & well adapted policy will not fail to promote the interest of all. It is true, that such is the extent of our territory, & such the variety in our products, natural & manufactured that what would be wide-spread foreign commerce, on the Continent of Europe, becomes domestic with us, all carried on, under one general system, which gives, at the same time, uniformity to internal & external intercourse. And the fortunate & happy experience of half a century teaches us, that this system is practicable, notwithstanding its extent, & that there is no serious opposition between the interests of the various portions of the Country.

The opinions which the undersigned has expressed, relative to the operation of the law of Mar. 1833 & to what is required for the protection of the industry of the country are his own opinions. He has felt it his duty to lay them before Congress, frankly, under the responsibility of his official station, & the duty expressly enjoined upon him by law ; & he cheerfully submits them to its consideration, since to Congress belongs the power of making such new laws, or so modifying those which may exist, as the public good shall seem in its wisdom to require.

Draft of a Message on the Exchequer

DECEMBER, 1841.¹

THE Secretary of the Treasury, in compliance with the Resolution of the House of Representatives, of the 15th. instant,² has the honor of submitting the draft of a Bill for the Establishment of a Board of Exchequer, at the Seat of Government, with agencies in the several States & Territories.

In preparing this Bill, it has been his intention to keep within & to fill up, the general outline of the measure proposed in the message of the President at the opening of the session; but he does not flatter himself, that it will be found so perfect in its details, as not to require modifications & careful revision by the Two Houses of the Legislature, even if it should find favor in its general character.

In what manner, & under what securities, the public money shall be kept; in what manner, or whether in any manner, this Gov^t. shall attempt to supply a paper medium for payments to the Treasury, & to benefit the general business of the country, by furnishing currency, & facilities of Exchange; are questions which have not ceased to agitate the community for eight years. Upon these questions, much opposition of opinion has prevailed, & intense political controversies & struggles have been founded. It is time, that this state of things was brought to an end. It is time, that such provision were made for their keeping, as

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society.

² "Resolved; that the Secretary of the Treasury be required to communicate to the House the plan of finance referred to and recommended in the message of the President of the United States at the present session of Congress." Congressional Globe, December 15, 1841.

that the people may feel that the public treasures are safe. It is time, too, that in relation to Currency & Exchange, individuals may know what they have to expect, or whether they may expect any thing, from the measures of Government. Doubt & uncertainty, in this respect, constitute the worst of all conditions. They affect every man's means of living, & instead of giving encouragement, & applying a stimulus to individual exertion & effort, they check the hand of industry, & suppress the spirit of enterprise, & bring stagnation & paralysis upon the productive power of the Country. On Subjects so vitally connected with every man's daily welfare, the people have a right to expect that what is to be done should be done without further delay, in order that they may accommodate themselves, to the policy of the Gov^{mt}. whatever that policy may be, & be prepared to give a corresponding direction to their own industry & business. The great want of the Country is the want of confidence; Confidence in the steadiness & stability of the policy of the Government; confidence in that which regulates the value of property, & the wages of labor; & confidence in the establishment & preservation of the necessary & ordinary means of exchanging production against production, so that the intercourse between different parts of the Country may be restored to its former security & activity. The object of the plan suggested to Congress in the President's message, & now presented for its consideration in the form of a Bill, is to establish this confidence, to give the Country repose; it is designed to restore that peace, quiet, & satisfaction with the state of public affairs, without which men cannot pursue their vocations with cheerfulness. Amidst the conflict of widely differing opinions, a measure is recommended, which avoids extremes, on both sides. It proposes less, far less, than many think desirable that Government should do, or attempt to do; & at the same time far more than others are ready to recommend. It aims at a just medium, a common ground, on which those may conveniently stop, who might yet wish to go farther & to which they may advance without self-reproach who yet fall short of it. It does not attempt to collect a Capital by private subscription for the general purposes of loans & discounts; & therefore does not propose to perform the ordinary

functions of a Bank. On the other hand, it does not propose to lock up all the public monies, from the time of collection to the time of disbursement, to demand specie payment for every debt due to Government, making no attempt to furnish the Country meanwhile with either currency or Exchange, but entirely contenting itself with securing specie payments into the Treasury. In these respects, it differs from the system established by the law now repealed, generally called the Sub-Treasury Act.

It is not the purpose of the undersigned to discuss, on the present occasion, the respective merits of these two systems, which may be regarded as the extreme opponents of each other. But he may be permitted to say, in regard to a Bank of the United States, that if there were in no quarter, any constitutional objection to the creation of such an Institution, he should nevertheless not recommend its creation to Congress, in the present condition of things, as a measure likely to afford relief to the Country. Such is the state of the currency, in many of the States, such the deplorable depression of general credit produced by that state of the currency & by other causes, & such the existing pressure in the money market, arising, as is believed, in a great degree from want of confidence, that there is little probability that private subscriptions, payable in specie would be obtained, to any Bank, with an ordinary charter. This opinion is strengthened by the fact, that six per cent stocks of the United States, now in the market, go slowly & heavily into private hands; & although this is doubtless partly attributable to the short period at which those stocks are made redeemable, yet the general fact concurs with other reasons in producing, on the mind of the undersigned, a full conviction that it would be useless, at the present moment, to attempt the creation of a Bank, with a capital to be furnished principally by private subscriptions, & intended to discount, thro' its branches, bills & notes in all parts of the Country, even if all Constitutional objections were out of the way. And in regard to the Sub-Treasury system it is perhaps enough to say, that the undersigned supposes a return to that system, at any time hereafter, an event highly improbable.

Between these two, the Bank, & the system of the Sub-

Treasury, the present plan is offered, seeking, as it does to avoid the extremes of each, & to accomplish to some extent, the good designed by both. The plan, such as it is, will be received & considered, it is not doubted, in a spirit of candor & conciliation, & with a disposition, not so much to persist in the pursuit of what appears unattainable, as to turn to the greatest practicable advantage of the Country, the use of all those means, the employment of which may be expected to meet the general concurrence.

The Bill now submitted to Congress may be considered as having three principal objects in view.

1st. The safe keeping of the public monies.

2^d. The furnishing, as well for convenient payments into the Treasury, as for the use of the Country, to some extent a paper circulation, always equivalent to gold & silver, & of universal credit.

3^d. A Provision for supplying, to some extent also, the means of a cheap & safe exchange, in the commerce between the States.

Of the high importance of the first of these objects, no one can entertain a doubt. The public monies are rec^d. by Government from the people, for the necessary uses of the Country, & ought ever to be regarded as a sacred trust. They are earned by the industry of the people, & while safely guarded, & applied only to really necessary purposes, will be cheerfully contributed by a patriotic community. But the people have a right to be as safe as good laws & a faithful administration can make them, against both waste & loss. It was a remark of the late president, striking by its brevity as well as its truth, that every dollar lost by unfaithfulness in office, tends to create a new charge upon the people.

Bill to Establish an Exchequer

DECEMBER 16, 1841.¹

A BILL to establish a Board of Exchequer, at the Seat of Government with agencies in the several States & Territories :

Be it enacted by the Senate & House of Representatives of the United States in Congress assembled,

1 Sect. That there shall be & hereby is created and established at the Seat of the Gov^t of the United States, a Board to be called the Exchequer of the United States, to be composed of the Secretary of the Treasury for the time being, the Treasurer of the United States for the time being, and three Commissioners to be appointed by the President, with the advice & consent of the Senate ; one of the said Commissioners first appointed to be appointed for two years, one for four years, & one for six years ; & vacancies subsequently occurring to be so filled, as that one vacancy shall regularly occur, at the end of every period of two years ; the terms of said appointments to commence from the 4th of March ; the said Commissioners not to be removed from office, except for inability, incompetency, or unfaithfulness ; & in the case of any such removal, it shall be the duty of the President to lay the reasons

¹ From a manuscript in Mr. Webster's handwriting, in the New Hampshire Historical Society. It is endorsed on the back — "Fiscal Agency, Dec. 16, 1841."

"On the 15th [December] Mr. Cushing made a call upon the Secretary of the Treasury for the plan of finance referred to and recommended by the President. Six days after, Forward submitted the Exchequer bill to the House, digested into sections, and accompanied by an exposé of the system, drawn, though not signed, by Mr. Webster." *Letters and Times of the Tylers*, by Lyon G. Tyler, Vol. II. p. 131.

thereof before the Senate. And on the first organization of the Board one of the three Commissioners shall, by the members thereof, be elected President thereof, who shall hold his office for two years, when a new election shall be made, & in like manner a new election shall take place afterwards, at the end of each successive period of two years. And said Board shall have authority to appoint all such cashiers, clerks, & inferior officers as the transaction of its business may require, & fix the amount of their respective compensations.

Sec: 2. It shall be the duty of the said Board of Exchequer to establish agencies or offices, in the principal cities of the States & Territories of the United States, & wherever they may deem such agency or office to be necessary, & also wherever Congress may by law require the same to be established; & to appoint agents, cashiers, clerks, & other officers for the management of such agency, & the transaction of its business; & to fix the amount of their respective compensations, except that the Board of Exchequer may authorize the appointments of the inferior officers employed at such agencies, by the principal officers thereof.

3. And be it further enacted, That the said Exchequer & its officers shall be the Gen^l agent of the Gov^t of the United States for receiving, safe keeping & disbursing the public monies, & transferring & transmitting the same, under the direction of the Secretary of the Treasury; and all public monies, rec^d from whatever sources, shall under the same direction, be paid into the said Exchequer, or its agencies; and the principal officers, employed in such agencies, shall give Bond to the United States, for such amount, & in such form as the Secretary of the Treasury shall prescribe; for the faithful performance of their duties, and the said Board of Exchequer, & its several agencies, shall pay all warrants, drafts or orders made thereon by the Treasurer of the United States, & of all disbursing officers and agents of the Government, having a right to draw therefor.

And all such payments shall be made at the option of the person entitled to receive it, in gold & silver coin, or in Exchequer Bills as hereinafter provided; & not otherwise.

4. And be it further enacted, That it shall be lawful for the

said Exchequer at the Seat of Government, & its several agencies, to receive, on private deposit, gold, silver, bullion, & Exchequer Bills, the property of individuals, to be held as, in other cases of deposits, made by individuals, for convenience & security; but it shall be the duty of the Board of Exchequer to establish such rules as shall so limit the amount of deposits on individual account, as that it shall not, at one time, exceed fifteen millions of Dollars.

5. It shall be the duty of the said Board of Exchequer, within three months after its first organization, to establish such by-laws, & rules of proceeding, as it may judge expedient & proper for the regulation of its concerns & the Government of its agencies; & copies of all existing by-laws, & regulations shall be laid before Congress, every year, at its annual session.

Sec. 6. And be it further enacted, That the Secretary of the Treasury is hereby authorized & directed to cause to be prepared Exchequer Bills of the denominations of five, ten, twenty, fifty, one hundred, five hundred, & one thousand Dollars, which bills shall be signed by the Treasurer of the United States, & countersigned by the President of the Board of Exchequer, & made payable to the order of the Principal agent, or agents, at each agency, & by him or them endorsed, & which bills shall be redeemable & redeemed in gold & silver, on demand, at the agency where issued.—And Bills intended to be issued at the Board of Exchequer to the order of the President thereof; & be by him indorsed.

And exact & perfect lists of all bills so signed shall be kept at the Treasury. And if it should be found inconvenient for the Treasurer of the United [States] to sign all such Bills, the same may be signed by the first Comptroller, or by the Register of the Treasury.

7. And be it further enacted, That the amount of Exchequer Bills issued & out standing shall not, at any one time, exceed the amount of \$15,000,000, unless otherwise ordered or provided by law; & the Secretary of the Treasury is authorized, from time to time, on the application of the Board of Exchequer, to supply both the Board itself, & its several agencies, with a suitable amount of Bills, to be used in the transaction of business; and all Exchequer Bills, issued under authority of

this act shall be receivable in all debts & dues to the Gov^t of the United States; and all creditors of the United States, and other persons entitled to payment from any Department or branch of the Government shall be paid, at their own option, either in Exchequer bills, or in gold & silver coin.

Sec. 8. And be it further enacted, That the Board of Exchequer at the Seat of Government, & each of its agencies, shall settle weekly or oftener, with all Banks in their neighborhood whose paper they may have received, & pay or collect, as the case may be, all balances between it & said Banks, & no Bank nor any individual shall be allowed to stand as Debtor to the Exchequer, or any of its agencies, on account. And it shall be the duty of said Board of Exchequer, & its several agencies, at all times so to limit its issues, that its gold & silver on hand shall be equal to one third the amt of such issues. And the said Board shall have power to issue in exchange for specie its own bills, or to sell drafts, upon the terms & under the restrictions hereinafter mentioned upon the several agencies and in like manner the said agencies may issue their own bills, in exchange of specie, or sell drafts on other agencies, or on the Board of Exchequer; or, upon deposit of gold and silver to issue certificates stating the fact of such deposit & that the sum deposited is subject to the order of the depositor, endorsed on the certificate.

But paper issued by the Board & its several agencies, whether in the form of Bills, or of certificates of Deposit shall be redeemable only at the place where issued, unless the Board shall see cause to order otherwise.

9. It shall be lawful for said Board of Exchequer, & each of its agencies, to purchase Domestic bills of exchange subject to the following rules & conditions:

1. No bill of exchange shall be bought which is payable in the same state, in which it is drawn, nor any bill payable within less than forty miles of the place of drawing.

2. Bills drawn on places not more than 500 miles distant from the place of drawing shall not be drawn for longer time than thirty days from date, and bills drawn on places more than 500 miles from the place of drawing shall not be drawn for longer time than 30 days from sight.

3. In no instance shall more be demanded from the seller of such bill, by way of interest or exchange, than an interest not exceeding six per cent for the time which the said bill has to run, & a rate of exchange never exceeding the cost of remitting specie; & such rate of exchange in no case to exceed two per cent.

4. No agency shall continue to deal in the purchase or sale of bills of exchange, on private account, in any State, in which such dealing shall be prohibited by a law of the State.

Sec. 10. And be it further enacted, That should it be found necessary at any time hereafter in order to accomplish the objects of this act, it shall be lawful for the Secretary of the Treasury, on the application of the Board of Exchequer, to issue stocks of the United States, not exceeding five millions of Dollars in the whole, to be placed at the disposition of the Board of Exchequer; and it shall be lawful for the said Board to dispose of the same, at a rate of interest, not exceeding six per cent, & to use the proceeds as a fund for carrying out & accomplishing the purposes of this act; the accruing interest on said stocks to be paid by the said Board, as the same becomes due; & in case of the creation & sale of such stocks, all profits accruing to the Board of Exchequer from its dealings in Exchange, beyond the expenses of the said Board & its agencies, shall constitute a fund for the redemption of such stocks, but the faith of the Government shall, nevertheless, remain pledged for the payment of the interest accruing on such stocks, & their ultimate redemption, according to the terms thereof.

Sec. 11. And be it further enacted, [That] The Board of Exchequer, & its several agencies, shall keep separate & distinct Sets of Books, for the purpose of entering & recording, in one Set, all transactions respecting the collection, keeping & disbursing of the public revenue, & transmitting the public monies from place to place, for the service of Government, & in the other all transactions & accounts arising from dealings in Exchange, not on Gov^t accounts. And all profits & receipts, from dealing in Exchange on individual account, shall be applied, in the first place, to pay all salaries & compensations, & to defray all expenses, incurred under the authority of this act,

& the residue thereof shall be paid annually into the Treasury of the United States, except in the case provided for, in the next preceding Section ; provided, nevertheless, that salaries & compensations of officers, for one year from & after passing this act may be paid at the Treasury of the United States, out of all monies not otherwise appropriated.

12. If it shall at any time become necessary to bring suit, on any bill of Exchange, or other debt or liability arising under the provisions or operations of this act, such suit may be brought in the name of the U. States, in any Circuit Court of the United States, or any State Court, having competent jurisdiction.

13. And be it further enacted, That the Board of Exchequer may provide, as well at the Seat of Government, as at the several agencies, all necessary buildings, rooms & vaults for the safe keeping of the public monies, & the transaction of business.

Sec. 14. And be it further enacted, That Full & exact accounts of the proceedings of the Board, & its several agencies shall be furnished to the Secretary of the Treasury, as often as he may prescribe ; & it shall be the duty of the said Secretary to lay abstracts of the same before Congress, at the commencement of each annual Session ; and the amount of Exchequer Bills, outstanding at the end of every quarter, shall, so soon thereafter as the same may be ascertained, be published by the Sec. of the Treasury.

British Special Mission

FEBRUARY 28, 1842.¹

WE may now expect to hear, every hour, of the arrival of Lord Ashburton at some point on our coast. The last account appears to be that he was to sail from Portsmouth on the 24th of January, in a steam frigate. We doubt whether the last part of this statement be correct; and are induced to think that the Minister will come over in a sailing man-of-war, and will come into the Chesapeake, or arrive at New York, as the wind and weather may recommend. By whatever passage, or in whatever course, however, he may come, his arrival may be looked for daily, supposing no accident to have taken place of a nature to cause delay.

We have no doubt that he will come clothed with full power to discuss and settle every question pending between the two countries.

Alexander Baring, Lord Ashburton, youngest son of the late Sir Francis Baring, and brother, of course, to the present Sir Thomas Baring, is not less than sixty-five or sixty-six years old. About twenty years ago he retired from the great house of Barings, of which he had been a member, with a very ample fortune, as is understood, and in the year 1835, if we remember right, was created a Peer. He took the title of "Ashburton" from the circumstance that the great Lawyer, John Dunning, created Lord Ashburton, was a connection of his family, whose male descendants had become extinct, and therefore the title had fallen.

¹ Published in the *National Intelligencer*, March 1, 1842. The manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch. Enclosed with the manuscript is a sheet containing this sentence in Mr. Webster's hand: "Lord Ashburton, we understand, is about sixty five years of age, with much talent for business, & plain & agreeable manners." This is endorsed by Mr. Gales, "D. W. Jan. 25, '42."

Lord Ashburton was for many years, a Member of the House of Commons, and took an active part, politically, in all questions of finance, commerce, and navigation. In 1811 he published a pamphlet, which we remember to have read, against the policy pursued by the English Government of that day towards the United States. The family have always been considered as entertaining liberal feelings towards this country. Forty-five or fifty years ago, it having become, for some reason, necessary to change the Agent of the United States in London, Sir Francis Baring, being requested to undertake that office, readily assented, and offered, so long as he should live, to receive funds from the American Government for the payment of its diplomatic agents abroad, without charge or commission. Lord Ashburton himself, as is well known, married a daughter of Mr. Bingham, of Philadelphia, and has a large family of children.

But, what is more than all, we have reason to believe that he is a man of intelligence and fairness, and cannot but therefore see and feel the great importance of removing all causes of difference now existing between the United States and Great Britain. We have no reason to doubt that such is the sentiment of the British Government. And we have confidence, also, that our own Government, representing the general feeling of the People of the United States in this particular, while it will surrender no right, nor yield to any unfounded claim, but, on the contrary, maintain all American interests with firmness and dignity, will yet enter upon the discussion of the various questions at issue between the two countries with a sincere desire to bring about an honorable and satisfactory termination of them all.

Editorial on the Ashburton Treaty

DECEMBER 2, 1842.¹

The ratifications of the treaty were exchanged in London on the 13th of October, 1842, by Mr. Everett and Lord Aberdeen. It was immediately attacked by Lord Palmerston in a series of Articles, in which he called the treaty Lord Ashburton's "capitulation," and represented that the American negotiator had entirely got the advantage in the whole matter. When these articles were read in this country, Mr. Webster amused himself by writing the following paragraphs, apparently for the editorial columns of some newspaper. — *George Ticknor Curtis. The Life of Daniel Webster*, II., 147.

WE are assured from authentic private sources that the several articles which have appeared in the *London Morning Chronicle*, treating Lord Ashburton with so much severity, were really written, as has been ascribed, by Lord Palmerston, late Secretary of State for Foreign Affairs.² In these articles, the writer calls the treaty "Lord Ashburton's capitulation;" and, as the papers have spoken of the probability of his lordship being made an earl, he recommends that his new title be "Earl Surrender." Parliament meets for the dispatch of business about the 1st of February, and Lord Palmerston will then, no doubt, followed by his Whig friends, transfer his attacks from the daily journals to the House of Lords and House of Commons. The walls will be made to ring long and loud with charges of imbecile negotiation, disregard of public interest, and sacrifice of English honor. Now, it will probably so happen that, just about this time, the 1st of February, the speeches of Mr. Senator Benton, and other Senators, against the treaty, as a "capitulation," on our part, and as entitling the Secretary of State to be called "Mr. Surrender," will be published in the London newspapers. It will be very amusing, when Sir Robert Peel

¹ From *The Madisonian*.

shall rise to answer Lord Palmerston, to see him producing Mr. Benton's authority to prove that the British minister got the whole advantage in the treaty, and that the honor and interest of the United States have both been sacrificed to British pretension and British superiority.

Having so much delighted, by his speeches, the American Senate, of which he is a member, Mr. Benton will have the rare fortune of delighting, at least in an equal degree, a British House of Commons.

Let us imagine to ourselves the scene. Lord Palmerston, after having made an elaborate speech against the treaty, sits down amidst the applause of his Whig friends.

Sir Robert Peel rises, and says that he shall answer the speech of the noble lord by reading the speech of an equally distinguished person — a Senator of the United States. He begins to read Mr. Benton's Speech; he soon comes to passages averring that the advantage of the treaty is all on the English side. The "*Hear him*" now begin to rise. The Premier goes on to read with more animation; he comes to studied and well-turned periods, insisting that the poor and feeble American Administration had been completely taken in by the British negotiator — 'over-reached, bamboozled, and humbugged.' The "*Hear him*" are renewed with still more enthusiastic approbation. Cheered by these manifestations of delight, the first minister assumes his most earnest and eloquent tones; reads through the honorable Senator's speech, and, concluding with the declaration of "the sacrifice of all American interest and honor, and of the complete triumph of British diplomacy," sits down in a tempest of applause.

A similar scene may be expected in the House of Lords when the grave and sober Earl of Aberdeen shall read the speech of the grave and sober Senator from Pennsylvania. But these distinguished Senators, who see so clearly that the Government of their own country has been completely outwitted or out-generalled, have not only the Whigs of England, with Lord Palmerston at their head, to contend with, they must be prepared to make battle also with the public sentiment of France, and indeed all Europe. For it is not a little curious that, while these gentlemen and a few others (and we rejoice to be able to

say a very few) make objection to the treaty that it abandons the American ground, the French press considers the treaty as an abandonment by England of her pretensions, and taunts M. Guizot for allowing the United States to carry a point of such magnitude in their negotiations with Great Britain, which France had been obliged to give up.

The speeches delivered in the Senate against the treaty will sound very oddly, we anticipate, in the ears of the Liberal party in France.

The Message

DECEMBER 3, 1842.¹

SHOULD a quorum be found in attendance in both houses of Congress on Monday, the message, according to usage will be transmitted on Tuesday.

Of course we know nothing of what the message will contain ; but we know that the Chief Magistrate is actuated by a sincere desire to do his duty, and that it must therefore be his object, to recommend such measures to Congress, as the good of the country requires.

That the message, whatever it may be, will be fiercely and coarsely attacked, there is no doubt. So reckless has a portion of the Press become, that nothing else can be expected. Indeed the more merit the message may have, the more sure it will be to meet assault and condemnation, in certain quarters. In proportion as it is likely to be acceptable to the country, in that same proportion will *party* dog it, from the Metropolis to every point on the frontier. All this we are prepared to see. But it is our purpose, in this article to address ourselves to that portion of the public press, which is really free and independent ; and God be thanked that there is such a portion of the public press and that it is increasing, every day.

We appeal to this part of the press to give the message a full insertion, a candid reading, and fair commentaries. But above all, that they publish it, that they circulate it, so that the People may have an opportunity to read and judge of it, unprejudiced, and unprepossessed by condemnation of it, in advance.

But it is our higher purpose, on this occasion, to appeal to the people themselves, to the great community of American

¹ Published in The Madisonian. The manuscript, in Mr. Webster's handwriting, is in the New Hampshire Historical Society.

freemen, to judge the conduct of the Government, established by themselves, with fairness and candor. It is their interests, which are at stake; it is *their* country, which is to be benefited by a good, or injured by a bad, administration of public affairs. They are competent to judge and to form just opinions. We entreat them to judge for themselves. It is often said, that the Present Chief Magistrate is a President without a party. If this be so, it would seem more reasonable that all should judge of his acts, free from the malign influences of party spirit. Let him be judged by his conduct.

It is usual that reports from the Departments having the principal expenditure of the public money, that is to say, the Departments of War, the Navy, and the Post Office, accompany the President's annual message. These reports give an account of the administration of the respective Departments for the past year. We invite the attention of the people to these reports. Let not their length, if they should be long, deter any one from going through them, who wishes to be truly informed of the progress and present state of public affairs. They may not be so vivacious and racy, as speeches in Congress, or the commentaries of the press. But being founded on facts, and official documents, they may be quite as useful in enabling the people to form a just opinion of the administration of the Government. It sometimes happens, that the commentary is read, without a previous perusal of the text; and there are but too many newspaper editors, who are disingenuous enough to write and publish harsh and violent denunciations of public papers, without publishing the papers themselves; a degradation, we believe, to which party has not fallen, in any quarter of the civilized world, except in these United States. Here again we appeal to the Independent Press; the Daily Press, the Penny Press, the magazines, to every editor conducting any journal which professes to treat of public affairs, that they give the country, the people, a fair opportunity to form their own judgment.

We would fain address a similar request to those members of Congress, who deem duty to the country to be a higher obligation than attachment to party. We know there are many such, and the hour is come, as we think, for reflection

and sober thought, with them all. Recent occurrences must have convinced every thinking man, that the public mind is not in a temper to second mere heated party efforts. There is a vast number of the people, of all parties, who doubt, whether party success, to whichever party it should fall, would afford assurance of relief to the suffering interests of society. They think that mere party power, exerted angrily on one side, and opposed angrily on the other, can never achieve that relief. They think, that the business of the country, the industry of the country, and the public faith and general honor and reputation of the country, can never be restored, but by the common efforts and cooperation of sober and patriotic men of all parties.

Every man must see, in the circle around him, that this is a growing sentiment, among those, who have no interest, separate from the general interests of the community.

The administration can have no object but to advance this general interest. It desires and seeks to advance it. Without too much retrospect on the past, or anticipation of the future, it proposes to consider things as they are, and apply the best practicable remedy. Let its recommendations be considered, fairly and candidly. If found erroneous, let superior wisdom correct them; but let neither the personal objects of individuals, the selfishness and recklessness of party, nor the fierceness of animosities arising from the past, deprive the people of the benefits of good government and useful administration.

If this great country, so rich in resources, so young and vigorous, so full of all the means of prosperity and happiness, be suffered to continue in its present depressed and ruinous condition, for want of wise and provident legislation, a heavy responsibility must rest some where. The President, we doubt not, is resolved, that this responsibility shall not fall on him. At the head of a Republican administration, seeking to conduct the Government on the true principles of liberty, justice, prudence and frugality, and anxious to do everything in his power to remove the causes which, at the present moment, operate so injuriously upon all the great interests of the country, he will not leave it to be said that he has shrunk from any thing, which the crisis demands.

The Exchequer

DECEMBER 6, 1842.¹

THERE appear to be clear proofs of a growing disposition in the public mind, to give the Exchequer a chance, and a trial. Many persons approve it altogether ; and among them some of acknowledged ability and experience ; and many others, feeling that something ought to be done, see no prospect of success in any other attempt.

But this dispassionate tone and tendency of public sentiment is not allowed to take its free course. Efforts are repeated in a certain portion of the press to prejudice the public judgment against " John Tyler."

We find the following paragraphs in the New York American of Friday last :

"To confide to men of John Tyler's selection (after we have recently seen what those selections are, and upon what principle made,) the power of buying and selling exchanges on account of the Government, would be a degree of political madness which cannot be anticipated in the Whig party.

"Imagine only some tool, such as Mr. Tyler could not fail to choose—some wretched, crouching sycophant—planted here in the city of New York, as agent of the Exchequer, with authority to buy and sell exchanges, inland and foreign—whose bills would be taken! It matters not to this Agent how much the Government may lose ; his business, as he would probably understand it, or be made understand, would be to take care that the Government gained votes and influence, although it might jeopard the People's money.

"Let no one, therefore, be deluded into voting for the Presidential Exchequer, on the ground that the President would select

¹ Published in The Madisonian. The manuscript, in Mr. Webster's handwriting, is in the New Hampshire Historical Society.

respectable and honest men as its agents. He has no sympathy with such men — cannot work with them, and has nothing to expect from them.”

So barefaced a proposition to place great measures of national legislation on mere party grounds, has seldom been avowed, even if such a motive has sometimes had its unacknowledged influence on the conduct of individuals.

“John Tyler” — to use the respectful appellation of the American — is President of the United States. He was chosen to the second office by the People, and came to the first in the constitutional mode of succession.

But the American considers “John Tyler” not of his party, nor of the party of the Whigs. He has no confidence in him, and presumes they have none; and therefore he calls on them not to concur in passing such a law, as, so far as appears, he would be willing they should pass if the provisions were carried into effect by one of their own party. This is the very ultraism of party spirit. That spirit could not well go further. It is an open and broad avowal of that preference of party and party objects over constitutional provisions and the will of the people regularly declared, which has undermined free institutions in other countries, and, it is well feared, may at some time undermine them in ours.

It is nothing to the editor of the American that “John Tyler” is President by the election of the people, and the provisions of the Constitution. It is nothing that the Constitution has conferred on him the same power as on other Presidents, and to be exercised under the same responsibilities. It is enough for him to know that a measure necessary to the public interest, might place the nomination of a dozen individuals to office in the hands of “John Tyler.” On this account he opposes the measure, and is willing to leave the public interests to shift for themselves. If a favorite of his party could have the appointment he would be for the measure. If his favorite candidate was President, he would not hesitate. But this not being the case, he admonishes the Whigs in Congress, not to trust to the constitutional organization of the Government; not to leave other Departments of the Government to

their own constitutional responsibility, and the exercise of their own constitutional powers; but they, the Whigs, having a majority in Congress, should interfere with the arrangements of the Constitution, and refuse to the Executive the exercise of powers which, if he were of their party, they would gladly confide to him. Now what is this but placing party considerations above the Constitution? What is it but advising one branch of the Government to obstruct and resist the ordinary exercise of its powers by another branch?

There is as much evidence that the President enjoys the confidence of the people as that the members of Congress enjoy it. He is President, holding his place in pursuance of constitutional provisions; they are members of Congress by the provisions of the same Constitution. But because he happens, or may happen, not to have *their* confidence, the confidence of the people shall go for nothing, and *they* will not trust *him* with the exercise of the powers properly belonging to his office!

These are the ideas of the proper duty of Departments in a Government organized upon the plan of a distinct division of power among its several branches, which the editor of the American entertains, and which he takes pains to urge upon his friends in Congress.

For the same reason, there should be no courts, because "John Tyler," President though he be, should not be trusted to nominate judges. There should be no Army and no Navy, because he could not be trusted with the nomination of their officers: there should be no appropriation for the foreign service abroad, for how can the Whigs of Congress trust "John Tyler" to nominate Foreign Ministers?

It has been supposed that, by the provisions of the Constitution of the United States, the Government might go on even if the various Departments should not harmonize in regard to all political questions. It has gone on, more than once, amidst great differences of political opinions, between different branches. Until now, party purposes have been kept within some limit; and members of one branch have not been publicly admonished and urged, by the public press, to pursue party ends, not only to the greatest prejudice of the public

interests — to the rejection of measures admitted to be for the public good, but to the obstruction and resistance of powers properly belonging to other Departments : in other words, to the general derangement of the Government, under its constitutional organization.

So much for the theory or principle of the objections set up by the editor of the American, to the Exchequer.

Now it appears to us that there would have been a great deal more, both of good sense and patriotism, if the editor of the American had addressed his friends to the following effect :

“ Whigs of Congress do your duty ! If the President shall violate his, you will not be answerable. You constitute the legislative power : see that this power is properly exercised — see that all useful laws are passed ; He holds the Executive power — if he shall abuse it, on his head be the responsibility, and on him fall the condemnation.

“ If you think the plan of an Exchequer to be such as that, if properly carried into operation, it would relieve the country, adopt it. Adopt it at once. Adopt it without hesitation. Prove your own supreme devotion to the public good. Clear yourselves of consequences. A crisis, an ordeal, is at this moment before you. The country looks earnestly and anxiously to see how you will bear yourselves in it. Follow your duty, your own duty, your peculiar duty, *your constitutional duty* — and if a flame should be kindled, seven times hotter than that of Nebuchadnezzar’s furnace, still, so acting, you will go through it ; and who ever else may be scorched or consumed, not a hair of your heads will be singed, neither will the smell of fire be upon your garments.”

The Jackson Fine

DECEMBER, 1842 ¹

I RECOMMEND to Congress to take into its consideration the propriety of reimbursing a fine, incurred by General Jackson at New Orleans at the time of the attack and defence of that city, and paid by him. Without any reflection, whatever, on the Judicial Tribunal which imposed the fine, its remission, at this day, may be regarded as not unjust or inexpedient. The great end of this judicial proceeding was promptly obtained. The voice of the civil authority was heard, amidst the glitter of arms, and obeyed by those who held the sword. The majesty of the law was thus vindicated; and although the penalty incurred and paid is worthy of little regard in a pecuniary point of view, it can hardly be doubted that it would be gratifying to a war worn veteran now in his retirement and fast drawing towards the close of life, to be relieved from the circumstances in which this judgment placed him. There are cases in which public functionaries may be called on to weigh the public interest against their own personal hazards; and if the civil law be violated from praiseworthy motives or overruling sense of public danger, and public necessity, punishment may well be restrained within that limit which asserts and maintains the authority of law, and the subjection of the military to the civil authority. The defence of New Orleans while it saved a city from the hands of the enemy placed the name of General Jackson among those of the greatest captains of the age and illustrated one of the brightest pages of our history. Now that causes of excitement existing at the time

¹ Draft of a paper, in Mr. Webster's handwriting, in the Greenough Collection. It is printed, with slight variations, in President Tyler's Message, December 7, 1842.

have ceased to operate, it is believed that the remission of this fine, and whatever of gratification that remission might cause to the eminent man who incurred and paid it, would be in accordance with the general feeling and wishes of the American people.

The Boundary Maps

FEBRUARY 27, 1843.¹

THOUGH we have no ambition and make no pretence to become champions for the present Administration in regard to its home measures, we feel entirely disposed to stand up for it in questions between this Government and Foreign Powers, where we believe it to be in the right as we undoubtingly believe it to have been, throughout the whole negotiation of the late Treaty with Great Britain.

The London Times, in common with other London papers, is very angry at what it civilly calls a trick practised by our Secretary of State in regard to a map mentioned in Mr. Rives's published speech on the Treaty. As we have not been able to lay this speech, or, indeed, any of the speeches on the Treaty before our readers, we state for their information, that we have turned to that speech, in the file of the "Globe," to find the ground for this coarse and unworthy charge of trickery, in the "Times," and truly it appears to us that there is not the slightest foundation for it.

The Representatives of Great Britain and the United States met in this city professedly to make a compromise and settlement by agreement.

It was not their purpose to discuss, at length, the rights of the parties or their respective titles to the territory in dispute. While this compromise was proceeding, Lord Ashburton

¹ Printed in the National Intelligencer. The original manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch. It does not contain the first paragraph printed in the Intelligencer, and varies slightly in other respects.

See Mr. Webster's letter to Edward Everett, April 25, 1843, printed in Letters Hitherto Uncollected, also his Speech on the Northeastern Boundary, April 15, 1843, Collected Works.

signified to Mr. Webster that he had brought with him newly discovered papers which he thought quite explanatory of the Treaty of 1783; but he did not show them, nor particularly describe their nature. A compromise was agreed upon, and while the Treaty was in the Senate, and under discussion, the Chairman of the Committee on Foreign Affairs (Mr. Rives) adverted to a map, which had been found in the Foreign Office at Paris, and which it was supposed might be connected with a letter written by Dr. Franklin to the Count de Vergennes, of the 6th of December, 1783, and that those two documents, if they could be proved to have reference to each other showed such color for the British claim as might have had influence before an arbitration. Hereupon Mr. Benton produced another Parisian map, supposed to coincide exactly with that found by Mr. Sparks, for the purpose of showing, as he said, that the latter discovered nothing new, or which might not have been found in other places.

It is probable that these maps had no great influence either way, but it is strange that it should be thought to have been a part of Mr. Webster's duty, to furnish Lord Ashburton with a doubtful though plausible piece of evidence of this kind, to aid and strengthen the British claim. When parties meet to settle a dispute, is it usual for each to state to the other, all his grounds for fearing that he might not recover all he claimed, if the dispute should go on? Besides, these maps, letters, &c, were all as accessible to one party, as much as to the other. The industry of the English Foreign Office had it would seem, found papers not known to this Government. They were not communicated. And if, among public archives papers had been found and placed in the hands of the Government of the United States what obligation was there to communicate them to the English Government?

To have shown the map and letter of Dr. Franklin would not only have been the extreme of folly, but in all likelihood would have produced great mischief. What would Lord Ashburton have done? If he had attached importance to the map, he could have made no treaty, and the whole affair would have remained only the more embroiled. No doubt he is thankful that he knew nothing of it, if indeed such be the case. It was a matter

which, after all, if it had been known would have been vastly more likely to do harm than good, — more likely to create new difficulties than to settle old ones.

But our purpose in noticing this subject was principally to express our own opinion upon the notion of a part of the London press, that Mr. Webster was bound to perform an act so void of sense as to furnish the British Envoy with new grounds for maintaining the plausibility of the British claim.

The Suppression of the Slave Trade

MARCH 25 AND APRIL 27, 1843.¹

The Convention of March, 1824, between the United States and Great Britain, for the Suppression of the African Slave Trade.²

THE two Houses of the British Parliament and the Chambers of Peers and Deputies in France were all occupied, at the

¹ Two papers printed in the *National Intelligencer*. The original manuscript of the second article, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch, and on April 27, 1843, he wrote the following letter to Edward Everett, stating that he was responsible for both articles:

"MY DEAR SIR: I send you a copy of the *Intelligencer* of March 25th, and a copy also of that paper of yesterday, for the purpose of drawing your attention to an editorial article in each, for which I am responsible. X, in yesterday's paper, is H——E——. Disappointment, or some other cause, has led him to rank himself with the *disaffected*. Whatever I do he is sure to find fault with; and, though we used to think him a person of some talent, he is always wrong, growing vain and conceited in his old age, without growing wiser.

"I took a good deal of pains to procure a solemn declaration to be made by the President in his message to the Senate, to the effect that this Government could not and would not interfere in behalf of American vessels found engaged in the slave-trade. I deem this to be of the very first importance. It will check designs of slave-dealing in their bud. I already see consequences of magnitude resulting from it. It is now understood that, in every application for interference made at this department for alleged detention by British cruisers, the case will be strictly inquired into, and closely sifted; and, if just suspicions be awakened, not only will no interference be made, but the case itself will be referred to the prosecuting officers of the Government. I wish Lord Aberdeen and Sir Robert Peel may be assured of this.

"I feel great confidence that the two Governments may escape all future collision or disputes about the right of search; and this is a most desirable object with me. I am well aware that, misled by circumstances, American vessels may sometimes be mistaken for English or Spanish or Portuguese. But, in general, serious

² *National Intelligencer*, March 25, 1843.

most recent dates, with continued and earnest discussions of the question of the Right of Search, and of the bearing and influence of the Treaty of Washington on that question. Indeed, it seems to be the common topic of discussion all over Europe; and it is of so interesting and delicate a nature, touching the rights, and still more nearly the pride, of great maritime States, not a little jealous of each other, that we incline to think that the general canvass and argument of it will not for some considerable time reach their close. It is not to be disguised that the Treaty of Washington, while it has placed this country in a new attitude, has led France, on the one hand, or at least a considerable portion of the French press and the French people, to insist, and England, on the other hand, to deny, that the fair inference to be drawn from its negotiation and conclusion is a surrender by England of her asserted claim of search, or visit.

Among the letters and papers recently communicated to Congress, we find one from Mr. Wheaton, the accomplished Minister of the United States at the Court of Berlin, under the date of the 16th of November, 1842, to the American Secretary of State, from which we copy the following extract :

“Your despatch, No. 36, enclosing a copy of the treaty recently concluded at Washington between the United States and Great Britain, has just reached me. I beg leave to congratulate you, sir, on the happy termination of this arduous negotiation, in which the rights, honor, and interests of our country have been so successfully maintained. The arrangement it contains on the subject of the African slave trade is particularly satisfactory, as adapted to secure the end proposed by the only means consistent

consequences in such cases may be avoided, if parties conduct with moderation and prudence. I trust that my last public dispatch to you, the instructions given to our American squadron, the President's message to the Senate, already referred to, and such use as you may properly make of this private letter, will satisfy the British Government of the sincere desire felt by us to accomplish the object, common to both Governments, without prejudice or danger to the just rights of either. Nothing gives me more satisfaction, in leaving this department, than the humble trust that the questions which have existed between the two countries, and which have been subjects of discussion since I came into office, will be found to have been settled in a manner honorable to both, likely to promote harmony and goodwill between them, and to preserve the peace of the world.

“Yours always cordially,

“D. W.”¹

¹ Life of Webster, by George Ticknor Curtis, Vol. II. pp. 165-166.

with our maritime rights. This arrangement has decided the course of the French Government in respect to this matter. Its ambassador in London notified to the conference of the five great Powers the final determination of France not to ratify the treaty of December, 1841, and at the same time expressed her disposition to fulfil the stipulations of the separate treaties of 1831 and 1833 between her and Great Britain. The treaty of 1841, therefore, now subsists only between four of the great Powers by whom it was originally concluded ; and as three of these (Austria, Prussia, and Russia) are very little concerned in the navigation of the ocean and the trade in the African seas, and have, besides, taken precautions in the treaty itself to secure their commerce from interruption by the exercise of the right of search in other parts, this compact may now be considered as almost a dead letter.

“The policy of the United States may consequently be said, on this occasion, perhaps for the first time, to have had a most decisive influence on that of Europe. This will probably more frequently occur hereafter ; and it should be an encouragement to us to cultivate our maritime resources, and to strengthen our naval arm, by which alone we are known and felt among the nations of the earth.”

In all these opinions we heartily concur. But our present especial purpose is to recall to the attention of our readers the history and the character of the Convention concluded between Great Britain and the United States in 1824 ; because we see much reference to that instrument abroad, and mistakes and misunderstandings in relation to it to be more or less prevalent in various quarters. A speech of Lord Brougham in the British House of Lords, on the 7th of February last, is entirely devoted to an account of that Convention, and the negotiations and correspondence which preceded and followed it. But even Lord Brougham has fallen into some inaccuracies, of a minor, and perhaps unimportant character.

Mr. Webster here gave in full Lord Brougham's speech, and continued as follows :

So far as Lord Brougham here represents Monsieur Dupin as being misled into an exceedingly erroneous statement, in saying that the Senate of the United States refused to concede

the right of search under any form, his Lordship is quite correct. The French orator, it is certain, was strangely mistaken. The Senate of the United States did, on the 22nd day of May, 1824, agree to the cession of a mutual right of search of American and British merchant vessels, suspected of being engaged in the slave trade, by the cruisers of both countries.

The Convention had been signed, in London, on the 13th day of March, 1824, by Mr. Rush, on behalf of the United States, and Mr. Huskisson and Mr. Stratford Canning on the part of his Britannic Majesty. It was communicated to the Senate by Mr. Monroe, then President of the United States, on the 30th of April, for its advice, in the usual form. It consisted of eleven articles. The first and most important article stood in these words :

“ Article 1. The commanders and commissioned officers of each of the two high contracting parties, duly authorized, under the regulations and instructions of their respective Governments, to cruise on the coasts of Africa, of America, and of the West Indies, for the suppression of the slave trade, shall be empowered, under the conditions, limitations, and restrictions hereinafter specified, to detain, examine, capture, and deliver over for trial and adjudication, by some competent tribunal, of whichever of the two countries it shall be found on examination to belong to, any ship or vessel concerned in the illicit traffic of slaves, and carrying the flag of the other, or owned by any subjects or citizens of either of the two contracting parties, except when in the presence of a ship of war of its own nation ; and it is further agreed that any such ship or vessel so captured shall be either carried or sent by the capturing officer to some port of the country to which it belongs, and there given up to the competent authorities, or be delivered up, for the same purpose, to any duly commissioned officer of the other party, it being the intention of the high contracting Powers that any ship or vessel within the purview of this convention, and seized on that account, shall be tried and adjudged by the tribunals of the captured party, and not by those of captor.”

The second article provided that vessels chartered by British subjects, or American citizens, might be detained, and sent in, in the same manners as vessels owned by such subjects, or citizens.

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The third article declared that boarding officers should leave with the master of the vessel boarded a certificate of the purpose or object of the boarding; and that on delivering over for trial any vessel, all papers found in her should be delivered also.

The fourth article limited the search to what should be necessary for ascertaining by due and sufficient proofs, whether the vessel was or was not engaged in the illegal traffic, and made provision for the disposition of slaves found on board.

The fifth article made it the duty of the public ships of the two countries mutually to receive from one another, on request, vessels captured by the party making the request, but found to belong to the country of the other; to receive such vessels and send them to the country where they belonged for trial.

The sixth article stipulated that in case of capture, by the vessel of one party, of a vessel belonging to the other, where there should be no public vessel of that other party to receive the captured vessel, the captors were to send her to her own country, or some one of its dependencies, for trial.

The seventh article declared that vessels sent in for trial, their commanders and crew, should be proceeded against, conformably to the laws of the country into which they are brought, as pirates engaged in the African slave trade.

This article also contained a clause in the following words :

“And it is further agreed that any individual, being a citizen or subject of either of the two contracting parties, who shall be found on board any vessel not carrying the flag of the other party, nor belonging to the subjects or citizens of either, but engaged in the illicit traffic of slaves, and lawfully seized on that account by the cruisers of the other party, or condemned under circumstances which, by involving such individual in the guilt of slave trading, would subject him to the penalties of piracy, he shall be sent for trial before the competent court in the country to which he belongs; and the reasonable expenses of any witnesses belonging to the capturing vessel, in proceeding to the place of trial, during their detention there, and for their return to their own country, or to their station in its service, shall, in every such case, be allowed by the court, and defrayed by the country in which the trial takes place.”

The eighth article contained a declaration in these words :

“The right, reciprocally conceded by the two contracting Powers, of visiting, capturing, and delivering over for trial merchant vessels of the other engaged in the traffic of slaves, shall be exercised only by such commissioned officers of their respective navies as shall be furnished with instructions for executing the laws of their respective countries against the slave trade. For every vexatious and abusive exercise of this right, the boarding officer, and the commander of the capturing or searching vessel, shall, in each case, be personally liable, in costs and damages, to the master and owners of any merchant vessel delivered over, detained, or visited by them, under the provisions of this convention.”

And it then proceeds to prescribe the manner in which masters and owners may recover damages and costs for unjust detentions, or any vexation or abuse, such damages and costs to be awarded against the boarding officers by the courts of the country to which the captured vessel belonged, and the Government of such boarding officer to see the same duly paid.

The ninth article provided that cruising vessels should be provided with copies of the Convention and of the laws of both countries against the African slave trade, &c. &c.

The tenth article is in the following words :

“Article 10. The high contracting parties declare that the right which, in the foregoing articles, they have each reciprocally conceded, of detaining, visiting, capturing, and delivering over for trial the merchant vessels of the other engaged in the African slave trade, is wholly and exclusively grounded on the consideration of their having made that traffic piracy by their respective laws ; and, further, that the reciprocal concession of the said right, as guarded, limited, and regulated by this convention, shall not be so construed as to authorize the detention or search of the merchant vessels of either nation by the officers of the navy of the other, except vessels engaged, or suspected of being engaged, in the African slave trade, or for any other purpose whatever than that of seizing and delivering up the persons and vessels concerned in that traffic for trial and adjudication, by the tribunals and laws of their own country ; nor be taken to affect in any other way the existing rights of either of the high contracting parties.

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And they do also hereby agree and engage to use their influence, respectively, with other maritime and civilized Powers, to the end that the African slave trade may be declared to be piracy under the law of nations."

The eleventh and last article, only provided for the exchange of the ratifications in the common form.

Such were the stipulations and agreements contained in the convention of the 13th March, 1824.

Some delay occurring in the Senate, in regard to the ratification of this convention, President Monroe, on the 21st of May, sent an elaborate message to that body, strongly urging the ratification of the instrument as it stood.

But the Senate saw fit to amend the treaty, in four particulars, to wit:

1st. By striking out in the first article the words "of America." The only effect of this amendment was to limit the conceded right of mutual search and detention to the coasts of Africa and of the West Indies, excluding those of America. The principle of the treaty was not at all altered.

2d. By striking out the whole of the second article, of which we have above given an abstract.

3d. By striking out of the seventh article the words which we have above quoted at length from that article.

4th. By adding the following proviso, viz.

"Provided that an article be added, whereby it shall be free to either of the parties, at any time, to renounce the said convention, giving six months' notice beforehand."

Thus amended, the Senate agreed to the ratification of the treaty, by a vote of 29 to 13 as follows:

"Yeas — Messrs. Barbour, Barton, Benton, Branch, Brown, Clayton, Eaton, Edwards, Findlay, Hayne, Holmes, of Mississippi, Jackson, Johnson, of Kentucky, Henry Johnson, Josiah S. Johnston, Kelly, King, of Alabama, King, of New York, Knight, Lloyd, of Massachusetts, Lowrie, McIlvaine, Mills, Parrott, Seymour, Taylor, of Indiana, Taylor, of Virginia, Van Dyke, and Williams.

"Nays. — Messrs. Bell, Chandler, D'Wolf, Dickerson, Elliott, Gaillard, Holmes, of Maine, Macon, Ruggles, Smith, Thomas, Van Buren and Ware."

A correspondence then ensued between the two Governments on the subject of these amendments of the Senate ; and, in instructing our Minister in London, Mr. Rush, to give explanations respecting them to the British Government, Mr. Adams, then Secretary of State, directed him also to state that the President was fully prepared to have ratified the convention without alteration. The British Government found no insuperable objection to any of the Senate's amendments, except that to the first article, which excluded the coast of America from the sphere, or zone, of mutual search.

Mr. Webster here quoted from a note addressed to Mr. Rush by George Canning, continuing as follows :

We must say that we see no particular force in these objections of Mr. Canning. The Senate acted, probably, on the idea that it would be invidious and reproachful to give a right to English cruisers to search American merchant vessels for slave dealers on the very coasts of the United States ; and we think this was a natural and just sentiment, and are happy to see that Lord Brougham entertains the same opinion. Nevertheless, it seems no more than a just presumption that Mr. Monroe, under whose direction the Convention had been drawn up in this city and sent to Mr. Rush, as well as Mr. Rush and the English negotiators, when speaking of the "coasts of America," had mainly in their thoughts South America, and especially Brazil ; and that they were not looking to the immediate coasts of the United States. On the 6th of November, 1824, Mr. Addington proposed to Mr. Adams, in behalf of the British Government, to take the Convention, exactly as amended by the Senate, with the exception of the erasure of the word "America" in the first article. To this Mr. Adams replied that the President "had thought it more advisable, with reference to the success of the object common to both Governments, and in which both take the warmest interest, to refer the whole subject to the deliberate advisement of Con-

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gress." No further correspondence, so far as we recollect, took place between the two Governments upon the subject; so that here ends the history of the Convention of 1824.

We pause now to recall the attention of our readers to the list of yeas and nays which we have quoted above from the journals of the Senate, to the end that they may see who those Senators were, who, in 1824, agreed to concede to England, in its fullest and largest extent of principle, the right, to be exercised by her armed cruisers, of searching American merchant vessels suspected of being engaged in the slave trade. It is not, however, to be inferred from this that, in our opinion, the Convention of 1824 was a wise and expedient measure. We did not at the time, however, and do not now, regard it as in any way derogatory to the honor of the country; because this right of search was to be exercised; and only exercised, by consent, and under treaty stipulations. But we were not thoughtless of the consequences to which the exercise of such a right might lead, even when founded on consent and on treaty; and therefore our conviction is clear and strong that the provisions for suppressing the slave trade, contained in the Treaty of Washington, are much more safe, and, if carried out with spirit and determination, will be more effectual for their object, than would have been the operation of the Convention of 1824. Nevertheless, when a very foolish, and, in our judgment, a very mischievous attempt is being made to embroil the two countries on this subject of the right of search, it is not amiss to bring afresh to the notice of this country the names of those who affirmed the principle of conceding the mutual right of search in 1824. We record this, and now renew the record, not to reproach anybody for the past. It will hardly be expected of us that we should be found reproaching political gentlemen for conduct which was in accordance with the judgment and official acts of President Monroe and his constitutional advisers. If we feel any disposition towards rebuke, (if that be not too strong a word for our humble selves,) it arises from the contrast between their conduct at that time and certain recent proceedings, votes, speeches, and declarations. Let it be remembered, therefore, amidst the noise and clamor attempted to be raised at the present

moment against all who will not rush headlong into every project tending to disturb our peaceful political relations with England, that among those who, in 1824, were ready and willing to grant, in its fullest measure, the mutual right of search to England, are found the names of Gen. Jackson, Messrs. Branch and Brown, of North Carolina; Hayne, of South Carolina; Johnson, of Kentucky; King, of Alabama; Holmes, of Mississippi; and Benton, of Missouri; as well as those of Rufus King, James Lloyd, James Barbour, E. H. Mills, and others.

There are two things which ought to be here distinctly and prominently noticed.

One is, that mutual search, in the case of vessels suspected of being engaged in the slave trade, was a proposition made by the United States to England in a convention, the draught of which was made in this city, not only with the approbation of Mr. Monroe, then President, but, as we have occasion to know, under his particular inspection and by his express direction.

The other is, that this concession of a right of mutual search had for its fundamental condition another idea, altogether of American origin — that is, that the slave trade should be denounced as piracy by acts of legislation. In regard to the United States, this was done by the act of Congress of May 15, 1820; and on the 28th of February 1823, the House of Representatives, by a vote of 131 to 9, passed the following resolution:

“Resolved, That the President of the United States be requested to enter upon, and prosecute, from time to time, such negotiations with the several maritime Powers of Europe and America as he may deem expedient for the effectual abolition of the African slave trade, and its ultimate denunciation as piracy under the law of nations, by the consent of the civilized world.”

The author and principal supporter of this resolution, as is well known, was that most amiable and estimable gentleman, then and for many years before and after, an able and leading member of the House of Representatives, Charles Fenton Mercer, of Virginia. At the request of the United States,

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urged in consequence of this resolution, England followed the example of the United States, and in like manner declared any of her subjects, found guilty of participating in the slave trade, to be guilty of the crime, and subject to the penalty, of piracy.

We must confess that, in these various proceedings on the part of the Government of the United States, there is something which may appear a little incongruous. Vessels justly suspected of being pirates, it has been admitted, may justly be visited and examined by the cruisers of all nations; because pirates are the general enemies of the whole human race. The character of piracy, therefore, was sought to be set upon the slave trade to authorize visit and search. But, if the slave trade be declared piracy, and well-grounded suspicion of piracy be always just cause for every armed cruiser to visit and search, where is the necessity for a special concession of the right of search, in the case of vessels suspected of being concerned in the slave trade? This knot, we imagine, can only be untied by the admission, that the effect of these statutes against the slave trade is only to make it piracy in a municipal sense, or as a transgression against the laws of particular States: still leaving a wide difference between it and that general piracy, or practice of freebooting on the seas, condemned and punished by the laws and practices of all nations. We should think that, if the slave trade is fit to be considered piracy, and treated as such, it ought to be piracy to all intents and purposes, and should so be regarded by all civilized States; and that the general consent and concurrence of nations would be quite sufficient to incorporate this principle into the universal code of the world.

But we may be wading beyond our depth. We return to Lord Brougham, only to notice the few and not very important errors which his speech contains. Lord Brougham is in error in supposing that the Senate of the United States passed any prospective resolutions on the subject of the Convention of 1824, or its principles or provisions. It is true that the proposition was "sent over," as his lordship states; but this was by the President alone, on his own authority, exercised according to the forms of our Constitution. The Senate, neverthe-

less, by a majority of more than two-thirds as we have already stated, sustained the President in the principle of the proposition which he had "sent over."

His lordship is mistaken, also, (unless perhaps it be the mistake of the reporters,) in regard to the instructions given by this Government to its representatives abroad. The words which he quotes as being addressed by the Department of State to Mr. Alexander Everett, then Minister of the United States in Holland, were not part of his instructions, but part of a note addressed by him to Baron Nagell, Dutch Minister of Foreign Affairs, under date of November 7, 1823. The passage runs thus :

"This pretended commerce [the slave trade] bears all the characteristics of piracy — that is, of felony committed on the sea. And, as it has been denounced as a crime by the greater part of civilized nations, it ought to fall in the particular class of crimes to which it naturally belongs, and undergo the penalties which the usage and the law of nations impose upon them. A unanimous declaration of the Christian Powers to this effect would inevitably produce the entire cessation of the trade. The public ships of each Power would then be authorized by the law of nations to cruise against the persons who might be engaged in it, without regard to the color of the flag with which they might pretend to be sheltered. Whilst if the trade is only regarded in each country as an offence against the municipal laws, it would be lawful for any one nation alone, by permitting it, to afford an asylum under its flag to the pirates of all the others."

Some other inaccuracies in the speech of Lord Brougham, as reported, might be pointed out, but they are unimportant, and we have already extended this article to a very unexpected length. The general character of the negotiation connected with the Convention of 1824 Lord Brougham has given fairly, and with his characteristic force and clearness. He places the transaction in the point of light in which it must stand in history, and shows, clearly enough, that his distinguished friend M. Dupin had been led into important errors and mistakes. Our object in this article has been to present an accurate outline of the whole transaction; to render auxiliary service to

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the cause of historical truth; and to show how great and patriotic men, now no more, have thought, and felt, and acted, on some of the questions which so much agitate the world at the present day.

We shall not regret the pains which we have taken, nor the space which we have devoted to the subject in our columns, if we have been able to bring to the minds of our readers a clear view of an important political occurrence, connected with a question of high interest, in the history of the country.

Remarks by the Editors¹

WE have cheerfully given place to the foregoing communication,² knowing the respectability of the source whence it comes. But we must, with great deference to our correspondent, still adhere to the opinions we have expressed. We have heard it said and repeated — so often that we suppose it must be a maxim of universal justice — that a person seeking redress for injuries before Government, or its tribunals, must come, as the saying is, with clean hands. He must show that he is an innocent sufferer; that wrong has been done to him while he was doing no wrong to others. Our remark, which our correspondent hopes that we will reconsider, was, that American vessels, engaged in the slave trade, and so guilty of piracy by our laws, cannot claim the interference of our Government, into whosesoever hands they may fall. We said nothing about the jurisdiction which should try such offenders. What we did say was no more than this: if the owner of a vessel complained to the Government of the United States that such vessel had been seized, annoyed, attacked, or otherwise badly treated by a foreign cruiser, and it appeared to the Government, at the same time, that when suffering the damage she was actively engaged in a notorious violation of the laws of her own country, the Government of that country could not be called on

¹ The second article referred to by Mr. Webster in his letter to Edward Everett. It was printed in the *National Intelligencer*, April 27, 1843.

² A letter to the *Intelligencer*, signed "X.," in which were quoted passages from letters of Mr. Rush to John Quincy Adams, and of Mr. Adams to George Canning.

to demand redress for her. Let us take the case out of the form of an abstract or general proposition, and put it into the concrete, or practical. Let us suppose the owners of a vessel to address their Government, and to say, "Mr. President, or Mr. Secretary, we are the owners of the barque Rachel; this vessel we were employing in the slave trade, on the coast of Africa; we were doing a very good and cheerful business; our gains were piling up fast; but a foreign cruiser interrupted us, disturbed our pursuits, seized, and delayed us; our slaves all escaped, and our loss is at least one hundred thousand dollars. Now, it is true, we were acting piratically; but then our acts were piracy alone by the laws of our own country, and therefore a foreign cruiser had no business to molest us. Wherefore, good Mr. President, or good Mr. Secretary of State, we as American citizens demand of you that you forthwith interfere; that you insist on immediate restitution and compensation by the Government of the country to which the foreign cruiser belonged; and that you threaten retaliation, and war, if such compensation be not made to the fullest extent. And, in the mean time, Mr. President and Secretary, we do not expect you to be so very uncivil as to take this petition of ours as evidence of our own guilt, and hand it over to the prosecuting officers of Government: because we assure you, and wish you to understand, that we present it to be used, not against ourselves, but against a foreign Government; and it would be quite unfair, while we are prosecuting such an honest purpose, to turn our petition against us, and convict us of slave dealing, felony, piracy, and murder, on our own confession."

We suppose, if an individual makes any unlawful contract, the law does not enforce it: if one party performs his side of such a contract, and he cannot compel his colleague in iniquity to perform his — no law in the world, we suppose, aids, succors, countenances, protects, or redresses individuals while violating the laws themselves.

President Tyler and the Whigs

1843.

“The unexpected accession of Mr. Tyler to the presidency, which brought his peculiar opinions respecting a bank into the Executive office, and enabled him to give them effect through the power of a ‘veto,’ caused a sudden and violent opposition to this important object of Whig policy. From the moment of Mr. Tyler’s ‘vetoes,’ it became the policy of Mr. Clay and his friends—acting, doubtless under the conviction that it was necessary so to do—to carry this question of a bank, and whatever was connected with it, forward into the next presidential election. As a part of these political tactics, the Whigs in Congress resorted to denunciation of President Tyler. What this produced can be best described in Mr. Webster’s own words which I take from a paper in his handwriting found in his private files of the year 1843.”—*George Ticknor Curtis. The Life of Daniel Webster*, II. 207.

THE editors of the *Intelligencer*, with an inconsistency no common degree of exasperation can hide from their own eyes, while they attack the President and the Administration every day, in the name of the Whigs of the country, and do every thing—and since September, 1841, have done every thing—in their power, to set all the Whigs in the country against them, constantly complain, nevertheless, or, more properly speaking, constantly fret and scold, at what they consider the efforts of the Administration to conciliate the favor and respect of the other party. The *Intelligencer* would have the Whigs be against the President, but at the same time would have the President be for the Whigs. Not infrequently it repudiates in the hardest terms what it pleases to call ‘cooing and courtship’ between the President and the Democratic party, in the very same columns in which it accumulates, from its own coin-

age or other sources, epithets of reproach and contumely against the President, such as never found their way into that paper before, as applied to the chief magistrate of the country, in the forty years of its existence.

In all this the *Intelligencer* only follows the leaders of the manifesto Whigs, whose conduct, in this respect, we must say, has been characterized by a very remarkable degree of assurance.

It is fit that the people should always hold in mind the general history of the dissension between the President and the Whig leaders of the present Congress.

Both the President and the Whig members of the present Congress came into power, on the same tide of popular opinion, in 1840.

By the death of General Harrison, the Executive authority devolved on the present President, and the power of Congress, as all the world knows, was wielded by Mr. Clay. Difficulties and discussions arose; Mr. Clay would not take Mr. Ewing's bill for a bank, and the President negatived two subsequent bills. In this state of things the Whigs assembled in the Capitol Square, on the 15th of September, and proscribed the President.

This is the whole story briefly told. It has been said, that only some forty or fifty members attended the meeting. However that may have been, the meeting purported to be "a meeting of the Whig members of the Senate and of the House of Representatives of the Twenty-seventh Congress." We believe it true that many Whigs, who did not attend the meeting, and some who did attend, disapproved the proceeding; but neither the one class nor the other had courage to make their absence or their dissent known. They allowed the proceedings to go forth, as the proceedings of the Whigs of both Houses of Congress.

We need not republish these proceedings; everybody knows that, in substance, they were a violent denunciation of the President, ending with a declaration, that the most they hoped for was, that they might be able to check or prevent some of the mischief which, under a different state of majorities, the President might have the power to impose.

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Now, can anybody wonder, after this, that the President should withdraw his confidence from the Whigs of Congress? We say the Whigs of Congress, because it is certain that very many of the most respectable and patriotic of the Whig party, out of Congress, lamented or reprobated all these proceedings, and still continue to repudiate them, and to deplore the consequences which have flowed from them. But the members of Congress, those who concurred in this manifesto, and those who, not concurring, had not decision enough to make their dissent known, is there any reason for all or any of them to complain that the President has withdrawn his confidence from these persons and given it to others? And the Whig presses which justified, and still justify these and other still more hostile and violent proceedings against the President, with what face can they arraign the President for being untrue to them and their friends in manifesting a desire to throw himself upon the country, upon the patriotic men of all parties, for a reasonable support of the measures of his Administration?

Time has already shown how really inconsiderable were the grounds upon which the leading Whigs in Congress went into their crusade against the President. Time has already shown how unimportant, practically and really, the measures were which threw them into such a flame. Who cares any thing now about the bank bills which were vetoed in 1841? Or who thinks now that, if there were no such a thing as a veto in the world, a Bank of the United States, upon the old models, could be established?

But our purpose is not, as proved, to go into an extended discussion upon these matters. It simply is, to present to the view of the world the bold injustice, not to use a stronger phrase, of reviling the President daily, in the Whig presses, seizing every opportunity to represent the breach between him and the Whigs to be incurable, and at the same time vociferously finding fault that he should think anybody else worthy of his confidence than the leaders of the Whig party.

The President's course, meantime, we are quite sure, will be commendable. His path is difficult and thorny; but it is short, and he will pursue it unseduced and untterrified by the ultraism which would cause him to swerve to the one hand or

the other. And while the *Globe* and Mr. Benton assail him daily on one side, and the *Intelligencer* and the partisans of Mr. Clay on the other, the great mass of patriotic citizens, who have no selfish interests in the squabble of parties, will be very likely to think him about right.

The Rejection of Mr. Henshaw¹

A COTEMPORARY journal expresses its pain at the rejection of Mr. Henshaw's appointment to the head of the Navy Department, and is at a loss to account for this act of the Senate. For the motives of those "Democratic" members of the Senate — if any there were — who voted against the nominee, we cannot undertake to speak ; nor indeed do we assume to be the exponents of the motives of either party for the act ; but we can well imagine what might have influenced the Whig portion of the Senate in the decision they pronounced on the nomination — confining ourselves to political considerations alone. There may have been others, but, if so, we do not meddle with them, for the sufficient reason that we are not informed of them.

With regard to the political considerations which may be supposed to have had weight with the Senate, it is not unnatural to presume that a majority of its members partake in the feeling, which seems to be general, even among men of all parties, in regard to the proceedings of last year, by which eminent and unexceptionable Whigs were most disrespectfully thrust from office, and their places filled by men of opposite politics. These Whigs had taken a decided part, for Genl. Harrison and Mr. Tyler, in 1840 ; and the persons by whom they were supplanted had been equally zealous champions of Mr. Van Buren, and unhesitating supporters of all the measures of his administration, Sub-Treasury, Sedentary Militia and all the rest.

A conspicuous instance of this suddenly-adopted policy was

¹ National Intelligencer, January 18, 1844. The original manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch.

the removal of Mr. Lincoln, from the Collectorship of Boston, and the appointment in his place of a decided adherent of Mr. Van Buren, through that gentleman's whole Administration. Mr. Lincoln is well known, as a gentleman of high character, who was many years Governor of the State of Massachusetts, and for several terms one of her Representatives in Congress. For public standing, intelligence, and integrity, he had nothing to suffer from comparison with any of those, who had an agency in his unceremonious removal. We say unceremonious; because it is said that the first notice of an intended change, given to Mr. Lincoln, was the appearance of his successor, with his commission in his pocket. In arranging this, and other similar Executive movements, no injustice, we presume, will be done to Mr. Henshaw, by saying that he is understood to have taken a prominent and leading part. Indeed, we may as well say, in plain terms, that everybody seems to understand, that Mr. Henshaw, came into the President's Cabinet, under a sort of bargain — and that is the softest phrase suited to the occasion — that havoc should be made, among the President's old friends the Whigs, and "the Spoils" bestowed on his old opponents, adherents in time past, like Mr. Henshaw himself, to Mr. Van Buren. It is lamentable, most lamentable, that the President should have been inveigled into such a course; and it is now entirely obvious, that those whose promises and blandishments led him to take this disastrous step, have shown themselves quite destitute, either of the will, or the power, or both, of rendering to the President or his Administration the least aid or support. It is generally understood, we believe, that the interference and recommendation of the rejected Secretary have been used directly and effectually, in causing changes of various small offices, especially in the Post Office Department, from Whig to Democratic hands.

We close this allusion to the subject with two surmises of our own, which our readers may receive for what they think them worth.

The first is, that when this turning out of Whigs, and appointing their opponents to office, began, there was a hope that Executive nominations would not be necessarily submitted, thereafter, to a Whig Senate. This hope, thanks to the spirited

efforts of the Whigs in Tennessee, Maryland, and other States, has been signally disappointed.

Our other surmise, — and it is something more than conjecture, — is, that those who were most importunate with the President to make thorough work in proscribing Whigs, having since seen in what hands a power, now quite important to themselves and their friends, is lodged, have been suddenly struck with a sense of the injustice of deserting old friends, and the propriety, as well as policy of extinguishing newly lighted flames of political love, and awakening the embers of former sympathies. In a question of *goring*, it makes all the difference in the world, who owns the *Bull*, and who owns the *Ox*.

Address on the Annexation of Texas

JANUARY 29, 1845.¹

It is a fundamental maxim of all our American Constitutions, that the people are the only rightful source of political power ;

¹ Proceedings of a Convention of Delegates chosen by the People of Massachusetts, without distinction of party, and assembled at Faneuil Hall, in the City of Boston, on Wednesday, the 29th day of January, A.D., 1845, to take into Consideration the proposed Annexation of Texas to the United States: Published by order of the Convention. Boston; 1845, Eastburn's Press.

Mr. Webster was not present at the Convention but he dictated the first portion of the Address. Hon. George F. Hoar in a paper entitled, "Charles Allen of Worcester," reprinted from Proceedings of the American Antiquarian Society, October Meeting, 1901, gives a very interesting account of its authorship. "Mr. Webster," says Senator Hoar, "met Charles Allen and Stephen C. Phillips at his office, I think on Sunday, the 26th day of January. . . He walked backward and forward in his office dictating to them the portion of the pamphlet which terminates at paragraph second on the tenth page. 'It affirms to you,' to quote Mr. Webster's own language, 'that there is no constitutional power in any branch of the government, or in all the branches of the government to annex a foreign state to this Union.' It will require no external testimony to convince any man who reads them that these pages are the work of Mr. Webster. Judge Allen and Mr. Phillips alternately used the pen while Mr. Webster dictated."

The Address was completed by Judge Allen. "The part composed by him," says Mr. Hoar, "begins at the place above indicated on page ten, and constitutes the rest of the pamphlet. It is praise enough, but not too much, to say of the work of Judge Allen that it is entirely worthy of its companionship, and that a casual reader, not informed of the history of the production, would not be likely to discover that the address was not the work of a single hand."

It may be added that a few days subsequent to the Convention, February 5, 1845, Charles Sumner wrote as follows to Judge Story, "You will read Mr. Webster's 'Address to the People of the United States,' promulgated by the Anti-Texas Convention. It is an able paper which will lift our

that government is a delegated and limited trust; that all authority not conferred is reserved; and that, in fact, there are grave questions, lying deeper than the organized forms of government, and over which government, in none of its branches, has just control.

When, in the course of events, a question of this kind arises, it is fit to be examined, and must be examined, by the people themselves, and considered and decided by an enlightened and conscientious exercise of public judgment, and a full and determined expression of the public will.

It is, perhaps, matter of necessity, that those to whom power is confided, under a free constitution, must be left, in ordinary cases to be judges, themselves, of the limits imposed on their own authority, subject to such checks and balances as the framers of government may have provided. But in times of great excitement, of political and party heat, in times when men's passions strengthen dangerously the natural tendency of all power to enlarge its limits by construction and inference, by plausible arguments and bad precedents, in such times it behooves the great constituent body to put forth its own power of investigation and decision, and to judge for itself, whether

public sentiment to a new platform of Anti-slavery." In a letter to John Bigelow, May 22, 1851, Mr. Sumner, referring to the Address adds, "the first half of which was actually composed by Mr. Webster."

Mr. Webster in many instances expressed his opposition to the Annexation of Texas. On January 23, 1844, he wrote a long letter to the Citizens of Worcester County, Massachusetts, on this question, and in his Speech of November 5, 1844, at Pepperell, Mass., he spoke in opposition to the annexation measure. This letter and speech are printed in the present edition of his Works. On December 22, 1845, in the United States Senate he opposed the admission of Texas into the Union in a Speech which is printed in his Collected Works. He said in this Speech that "it will always be a question whether the other States have not a right (and I think they have the clearest right) to require that the States coming into the Union should come in on an equality; and if the existence of slavery be an impediment to coming in on an equality, then the State proposing to come in should be required to remove that inequality by abolishing slavery or take the alternative of being excluded. I agree," he ended, "with the unanimous opinion of the legislature of Massachusetts; I agree with the great mass of her people; I reaffirm what I have said and written during the last eight years, at various times, against this annexation. I here record my own dissent and opposition; and I here record and place on record, also, the dissent and protest of the people of Massachusetts."

its agents are about to transcend their authority, and abuse their trust.

Such an inquiry, in the judgment of this Convention, is presented to the people of the United States, by the project broached last year, and now zealously and hotly pursued, of annexing Texas to the United States.

This question transcends all the bounds of ordinary political topics. It is not a question how the United States shall be governed, but what shall hereafter constitute the United States; it is not a question as to what system of policy shall prevail in the country, but what the country itself shall be. It is a question which touches the identity of the Republic. The inquiry is, whether we shall remain as we have been since 1789, or whether we shall now join another people to us, and mix, not only our interests, hopes and prospects, but our very being, with another, and a foreign State.

This fearful proposition must awaken, and we are glad to know does awaken, a deep and intense feeling throughout a great part of the country. It touches reflecting minds to the very quick, because it appears to them to strike at foundations, to endanger first principles, and to menace, in a manner well calculated to excite alarm and terror, the stability of our political institutions.

A question of this magnitude is too broad to stand on any platform of party politics; it is too deep for any, or all, of the political creeds and dogmas of the day; it presents itself, or should present itself, not to political organizations, not to existing parties, not to particular interests, or local considerations, but to the PEOPLE of the United States, the WHOLE PEOPLE of the United States, as a subject of the greatest and most lasting importance, and calling, earnestly and imperatively, for immediate consideration, and resolute action.

We are assembled here, where the voice of freemen is wont to be uttered, to signify our opposition to this project. And as the project itself is as bold as it is alarming, scarcely seeking to disguise the want of constitutional power to sustain it, and setting forth its great and leading objects, with so unblushing a countenance, and such hardihood of avowal, as to create astonishment, not only in the United States, but all over the

world; so, while we protest against it, in the most solemn manner, we shall state the great grounds of our protest, respectfully and dispassionately, but freely and fearlessly, and as if filled, as we are filled, with the most profound conviction that we are resisting a measure, the mischief of which cannot be measured in its magnitude, nor calculated in its duration.

We regard the scheme of annexing Texas to the United States, as being:

1. A plain violation of the Constitution.

2. As calculated and designed, by the open declaration of its friends, to uphold the interests of Slavery, extend its influence, and secure its permanent duration.

1. There is no constitutional power in any branch of the Government, or all the branches of the Government, to annex a foreign State to this Union.

The successful termination of the Revolutionary war left the old thirteen States free and independent, although united in a common confederacy. Some of these States possessed large tracts of territory, lying within the limits of their respective charters from the crown of England, not as yet cultivated or settled. Before the adoption of the present constitution, it is well known these States had made extensive grants of this territory to the United States, with the main original purpose of disposing of the same for the payment of the debt of the Revolution.

The cession of Virginia, to whom much the largest portion of this territory belonged, being all the land within her original charter, was made in 1784; and it was the express condition of that grant, that the ceded territory should be laid out and formed into States, each to be of suitable extent, not less than a hundred nor more than one hundred and fifty miles square.

At the adoption of the present constitution these territories belonged to the United States, and the government of the United States was bound to make provision for their admission into the Union, as States, so soon as they should become properly settled and peopled for that purpose. For the government of this territory the memorable ordinance of July, 1787,

was passed, and constituted the public law of the country, until the present constitution was adopted. It became then a part of the duty of the framers of that instrument to make provision suitable to the subject. The Constitution declares, therefore, "that Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory of the United States." This gave the authority of governing the territory, as territory, while it remained such. And in the same article it is provided as follows :

Art. 4, Sec. 3. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State, be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

It is quite impossible to read this clear and exact provision, without seeing that Congress had in view two forms in which new States might be created and admitted into the Union. 1st, They might be created out of the territory which the United States possessed, and in regard to which the original stipulation was, that it should be formed into States in due time, and those States admitted into the Union. 2d, New States might be formed by the division of an existing State, or by the junction of two or more States, or parts of States; but in this case the consent of the Legislatures of the States concerned was made necessary, as well as that of Congress.

It is plain and manifest that in all this there is not the slightest view towards any future acquisition of territory.

The Constitution was made for the country, as it then existed — that country then embracing both States and Territories, and it would be a perfectly hopeless task to seek to find, in the whole instrument, any manifest avowal, or any lurking intention to bring anything into this Union, not already belonging to it, either as a State or a Territory. The Constitution was no more meant to embrace Texas, than to embrace Cuba, or Jamaica, or Ireland. And it would well become those who are now making such efforts to torture the Constitution, till it shall seem to confer authority never intended by it, to acquaint

themselves somewhat better with the political history of the period of its adoption.

The old Confederation took effect in July, 1778, the third year of our independence. During the war the thirteen States had manifested a desire that their cause should be strengthened by the junction of Canada. There was, as all know, a very able and powerful address from the old Congress to the inhabitants of that Province, and the door was still kept open for Canada to come into the Union. By the eleventh article of the Confederation, it was expressly stipulated, that "Canada, acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to, all the advantages of this Union." Then follow these words — "but no other Colony shall be admitted into the same unless such admission be agreed to by nine States." Nine out of thirteen, then, being, two-thirds of all the original States, were required to assent before a new State could be brought in. Thus stood the great principle of our Union, when the present Constitution was framed, in 1787. At that time, but subsequent to the date of the articles of confederation, the United States, as we have seen, had acquired the vast territory northward of the Ohio, and stipulated that it should be formed into States.

The old provision in the eleventh article of the Confederation was omitted in the new Constitution, and a provision made, applicable, and only applicable, to States already in the Union, and territories already possessed by the United States.

We see, then, that under the Confederation, new States might come in by the consent of two-thirds, and not otherwise. We see by the present Constitution, provision is made for the admission of new States, formed out of the existing territory, or out of other existing States, and not otherwise. Is it not most manifest, that if the framers of the Constitution had looked to the admission of new States, to be formed out of territories afterwards to be acquired, it would, at least, have guarded such a purpose, and such a power, by such a limitation, at least, as should be equivalent to that on the same subject, contained in the Confederation?

The advocates of the annexation of Texas are driven to the necessity of contending, that new States may be admitted,

formed of territory out of the original limits of the United States, although the constitution has carefully and sedulously omitted and rejected the eleventh article of the Confederation, and has made a provision of its own, the end and design of which cannot be misunderstood or disregarded, without violence to plain terms and clear language, as well as ignorance of, or contempt for, all the contemporaneous history of the country.

They are obliged to contend, also, that this constitutional authority, raised by feeble and forced construction, by unfounded inference and remote analogy, extends not only to the admission of territories or colonies of other independent nations, but to these individual nations themselves; in other words, that a Government formed for the protection and benefit of the people of the United States, each one of which States is enumerated and set down by name in the Constitution of the United States, may not only add to the number of these States, but may also bring in a foreign power, with all its own peculiar interests, connections, debts and liabilities, not only without the consent of two-thirds of the States, or a majority of the States, or indeed without the assent of any one State already in the Union, acting in the capacity and manner in which the people of that State themselves came into it.

It is idle to say that the assent of the people of a State, in a great and fundamental question like this, is to be proved by, or inferred from, any vote of its Representatives in Congress. No member of Congress is sent there for that purpose, or clothed with any such authority. It is, indeed, extremely doubtful, if the question be not clear the other way, whether any State Government, organized for the common purposes of a State Government, could give the assent of such a State to the coming in of a new partner to the Union. When the people of Massachusetts gave their consent to form a political union with Virginia, New York and Pennsylvania, under the present Constitution, that assent was given, not by the Legislature, but by a Convention of Delegates, chosen directly by the people, for that single and express object, and no other; and with authority, therefore, to bind the people in a manner to which no other representative body was competent.

But it would seem to the members of this Convention, that if anything can be more clear than the want of all constitutional authority to annex Texas to the United States, it is that the form in which such annexation is now attempted to be brought about, is an undisguised and open violation of express constitutional provisions.

A Treaty, for the annexation of Texas, to the United States, was negotiated last year, between the President of the United States and the Texan Government, and laid before the Senate, for its constitutional ratification, at the last session of Congress. It was sent, like any other Treaty, and required, of course, the concurrence of the same proportion of Senators as other Treaties require, to wit, two-thirds of all present.

A confidence, very ill founded, as events have shown, had been already expressed, and signified to Texas, that the concurrence of that number of Senators was certain. After many weeks of debate, the Treaty was rejected by a vote of thirty-five to sixteen — it thus appearing that not only had two-thirds of the Senators not voted for it, but that two-thirds had voted against it. Here was supposed to be an end of the Treaty; but no sooner was Congress assembled, at its present session, than a joint resolution was introduced, declaring that this Treaty, the ratification of which had thus been decisively refused by the Senate, the only body which could constitutionally give it ratification, should, nevertheless, become the supreme law of the land. This resolution is now pending, modified in its form, but providing substantially for the same object; it has already passed the House of Representatives, and should it pass both Houses, then an attempt will have been made, and will have succeeded, so far as the forms of law are concerned, to ratify a Treaty by mere majorities of both Houses, instead of the constitutional authority of the Senate.

We know not on what occasion bad objects have been more emphatically pursued by bad means, or in which the recklessness of the original purpose has been followed up by grosser disregard of all constitutional and just restraint. If this precedent prevail, the Treaty-making power, as established by the Constitution, is at an end. It will be no longer for the Senate, the great conservative and most permanent body of the govern-

ment, to act deliberately and gravely on Treaties with foreign States, to judge of them in the light of its own wisdom, and under the responsibility of its own high character, and to grant its ratification, if the constitutional number of Senators present concur. The ratification of Treaties will become the business of party majorities, temporary majorities, it may be bare majorities, of the two Houses, acting under the influences, and liable to all the errors, which may occasionally affect the proceedings of such numerous assemblies.

Both the negotiation and the ratification of Treaties are, in their nature, parts of the Executive power of Government. Wherever the Executive power is vested, there the treaty-making power ordinarily goes with it, and as a part of it. There may, indeed, be limitations, introduced for greater security ; and in this case it is not important whether we consider the Senate of the United States as partaking, in these respects, of the Executive power, or as being clothed, by the provisions of the Constitution, with a special authority with regard to treaties. That authority is established, and does exist. It exists, in concurrence with the power of the President ; and if the ratification of a Treaty may be made by majorities of the two Houses, the negotiation of a Treaty might as well be undertaken by the same authority.

The House of Representatives has a Legislative power, and none other ; and whatever may be the form of a resolution or a law for the annexation of Texas, still, as such resolution or law must imply the assent of Texas, the thing to be accomplished is plainly a compact between independent Governments. It is, in its nature, therefore, a convention, or agreement between two nations ; and a convention or agreement between two nations is a Treaty, and must be sanctioned in the way provided for all treaties.

The entering into treaties with foreign nations is a matter of the very highest importance, often attended with danger, and always requiring grave deliberation. Yet the common good does require that Governments should enter into such treaties, for commercial and other just and proper purposes. But, while the power is granted, special limits and securities are also established. Senators are elected by States, and an

equal number from each State ; to decide upon treaties is one of their express constitutional powers and duties. No treaty with a foreign power can be ratified, unless two-thirds of the Senators concur ; in effect, unless two-thirds of the States concur.

Here is then a constitutional guaranty, not only that all treaties touching the general good of the country shall be deliberately considered, but that nothing which may affect the rights, interests and authority of the States shall be done under the treaty-making power, without the consent of two-thirds of the States themselves.

And it appears to this Convention, that if we can conceive of any bargain, compact or agreement with a foreign State, under the authority of the General Government, in which the States, as States, have a peculiar, most important and permanent interest, it is a compact or agreement by which another government or nation is to come into the Union, and become one of themselves.

Whoever seeks, therefore, to confer the power of ratifying treaties on any other body but the Senate of the United States, acting under its constitutional limitations as to numbers, appears to us to strike a deadly blow at one of those most considerable provisions, which regard the States as States, and give them, as States, an equal share in the administration of the government.

But we desire not to be misunderstood. According to our convictions, there is no power in any branch of the government, or all its branches, to annex foreign territory to this Union. We have made the foregoing remarks, only to show, that if any fair construction could show such a power to exist anywhere, or to be exercised in any form, yet the manner of its exercise now proposed is destitute of all decent semblance of constitutional propriety.

Great reliance is placed by the advocates of annexation on the precedents of Louisiana, and Florida. It is not to be denied that those precedents do create embarrassments on the present occasion, because precedents are often allowed to have influence, without full consideration of all the circumstances which may make them rather exceptions to a general rule than a regular emanation from it.

Louisiana was acquired under very particular circumstances, totally distinct from those which pertain to the present case, or can well exist in any other case; circumstances affecting and liable to affect, as well the peace of the country, as the useful enjoyment of its acknowledged territory. Every one saw the importance of the control of the mouth of the Mississippi; every one saw that while a foreign government held Louisiana, we commanded no outlet to the sea, from all the vast and fertile regions of the West. With Spain we had had difficulties, menacing war. It was obvious that our western region, filling up with such wonderful rapidity, by enterprising citizens, whose necessities for a passage to the ocean were increasing with their own population and their own products, would never refrain from insisting, at whatever hazard, on the free use of the greatest river in the world, along whose banks and among whose tributaries it was situated, from its sources to its mouth.

The acquisition of Louisiana was a measure of Mr. Jefferson's administration. He himself appears not to have had the slightest idea that it would ever be admitted into the Union, without an alteration of the Constitution. Such alteration of the Constitution was certainly contemplated, and even recommended by him; but the posture of things at the moment, and the general acquiescence of the country in the attainment of what it had seemed so necessary to attain, led to the ratification of the treaty, and to the subsequent admission of Louisiana into the Union, as a State, without any alteration of the Constitution.

Florida was also acquired by treaty. The objects of the acquisition were similar to those which had prevailed in regard to Louisiana, with this further inducement: that the whole value of the territory should be paid to citizens of the United States, who had just claims against the Spanish Government for seizures and spoliations of property.

These cases, in the judgment of this Convention, do not justify the attempt now made to annex Texas. We are not aware that they have ever been defended upon such grounds as are assumed in the case of Texas. They stand on reasons peculiar to themselves; and if, in regard to either of them, these peculiar

reasons, or the urgency of the case, or the general acquiescence of the country, either occasioned or overlooked a departure from constitutional principles or provisions, neither of them certainly can be allowed to have the authority of a general precedent. As cases decided and acted upon, let them stand; but if they are to be regarded as justifying authorities for other annexations, for which no necessity exists — annexations, not of territories, but of whole nations, then it is obvious that no man can foresee what may be the country of which he is a citizen, or under what forms of government he may hope hereafter to live.¹

II. "Annexation is calculated and designed, by the open declaration of its friends, to uphold the interests of slavery, extend its influence, and secure its permanent duration."

The frankness of this avowal supersedes the necessity of any attempt to strip off disguises, or to bring hidden and concealed motives, into the light. There is no disguise, the motives are all confessed. They are boldly avowed to the country and the world; and the question is therefore open, visible, naked, and in its true character, before the American people.

The Treaty of annexation was negotiated under the direction of Mr. Tyler, the present President of the United States. In the early stages of the negotiation it was conducted by Mr. Upshur, then Secretary of State, and was brought to its conclusion by the agency of the present Secretary, Mr. Calhoun.

When the Treaty was sent to the Senate, it was accompanied by an elaborate message from the President, setting forth its character and objects. It was accompanied by parts, though meagre and scanty parts, of the correspondence which had preceded its conclusion. Repeated and persevering calls of the Senate produced, at subsequent successive periods, other and much more important parts of that correspondence. Since the rejection of the Treaty, the Secretary of State has continued to address our public Ministers abroad upon the subject; and the country has now before it a mass of correspondence, between the Government in Washington and its diplomatic agents abroad, and between those agents and the Governments of Mexico and Texas. How far that correspondence, taken together, exhibits ability, dignity, self-respect and respect for the rights of others; how far its general character reflects honor and credit on the government of this country, we willingly abstain from undertaking to show. We refer to it now only as containing those open confessions and avowals, of which we have already spoken, of the purpose with which annexation has been proposed, and is now pursued with such unwearied perseverance.

Here, then, is a spectacle, in our judgment a sad spectacle, not only for the contemplation of our own country, but for that of the whole civilized

¹ Mr. Webster's portion of the Address ends here.

world. These advocates of annexation insist, that not only is Slavery an institution desirable in itself, fit to be retained, and necessary to be maintained, as a blessing to man, but they seem to insist, also, that a leading object of the Constitution of the United States was to guard it, defend it, and assure its perpetual duration. Let the Constitution of the country be vindicated from this imputation; let its objects and its purposes, its ends and its means, be clearly stated; and then no lover of human liberty will feel disposed to turn his back upon it with disrespect. The introduction of slaves into the Southern States, while British Colonies, is of early date. For that introduction, the mother country is to be blamed, more than the colonies themselves. Slavery thus got a footing in the country, and was found existing when the Revolution severed the United States from Great Britain. Like other concerns of the States, it was, up to the time of the adoption of the present Constitution, a subject of State legislation and regulation. It is certain that the Constitution recognized its existence. It took its existence as a fact, and as one fact going to make out that actual condition of things in which the Constitution was proposed to be established, and to which it was intended to be accommodated, so far as must necessarily be done.

The States in which involuntary servitude existed, were not called upon to abolish such servitude, before they could be admitted into the Union; nor, on the other hand, was the proposed government to be called upon to fortify the laws of the States, creating or establishing this involuntary servitude, by any interposition of its authority, or any guaranty or assurance whatever. It pledged itself, indeed, to exercise its authority to suppress insurrections, but this provision was as applicable to one State as another. There is reason, however, to believe that at that time there existed amongst the citizens of the country, generally, even amongst those of the slave-holding States themselves, a belief that slavery was on the wane; that new views of political economy and of general interest, would lead to the supplying of its place by free labor; and it may be added, with entire truth, that the successful termination of the war which had been waged for liberty and the rights of man, had impressed a general expectation that the political liberation of the country from foreign dominion would tend to produce dispositions favorable to a change of the relation between the black and white races; a change which, commencing with mitigation, and proceeding gradually and with safety from step to step, might eventually terminate in the total abolition of Slavery. Acts of legislation, official addresses, memorials, resolutions, and many other forms of public proceeding, showed clearly the existence of such an expectation. Let us recur to sentiments expressed at that time, by those whose memory the country loves and reveres, and whose wisdom, virtue, and patriotic exertions were most eminent in giving it an honored station among the nations of the earth.

Soon after the adoption of the Constitution, it was declared by GEORGE WASHINGTON to be "among his first wishes to see some plan adopted by which slavery might be abolished by law;" and in various forms, in public and private communications, he avowed his anxious desire that "a spirit of humanity," prompting to "the emancipation of the slaves," "might diffuse itself generally into the minds of the people;" and he gave the



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assurance, that "so far as his own suffrage would go," his influence should not be wanting to accomplish this result. By his last will and testament he provided that "all his slaves should receive their freedom," and, in terms significant of the deep solicitude he felt upon the subject, he most pointedly and most solemnly enjoined it upon his executors to see that the clause respecting slaves, and every part thereof, be religiously fulfilled, without evasion, neglect, or delay."

No language can be more explicit, more emphatic, or more solemn, than that in which THOMAS JEFFERSON, from the beginning to the end of his life, uniformly declared his opposition to slavery. "I tremble for my country," said he, "when I reflect that God is just — that his justice cannot sleep forever." * * "The Almighty has no attribute which can take side with us in such a contest." In reference to the state of public feeling, as influenced by the Revolution, he said, "I think a change already perceptible since the origin of the Revolution;" and to show his own view of the proper influence of the spirit of the Revolution upon slavery, he proposed the searching question: "Who can endure toil, famine, stripes, imprisonment, and death itself, in vindication of his own liberty, and the next moment be deaf to all those motives whose power supported him through his trial, and inflict on his fellow men a bondage, one hour of which is fraught with more misery than ages of that which he rose in rebellion to oppose?" "We must wait," he added, "with patience, the workings of an overruling Providence, and hope that that is preparing the deliverance of these our suffering brethren. When the measure of their tears shall be full — when their tears shall have involved Heaven itself in darkness, doubtless a God of justice will awaken to their distress, and by diffusing light and liberality among their oppressors, or at length, by his exterminating thunder, manifest his attention to things of this world, and that they be not left to the guidance of blind fatality!" Towards the close of his life, Mr. Jefferson made a renewed and final declaration of his opinion, by writing thus to a friend: "My sentiments, on the subject of the slavery of negroes, have long since been in possession of the public, and time has only served to give them stronger root. The love of justice and the love of country, plead equally the cause of these people; and it is a moral reproach to us that they should have pleaded it so long in vain, and should have produced not a single effort — nay, I fear, not much serious willingness, to relieve them and ourselves from our present condition of moral and political reprobation."

"It would rejoice my very soul," said PATRICK HENRY, in the Virginia Convention, "that every one of my fellow beings were emancipated. As we ought with gratitude to admire that decree of Heaven which has numbered us among the free, we ought to lament and deplore the necessity of holding our fellow men in bondage." "I believe a time will come," he also remarked, in a letter to a friend in his own State, "when an opportunity will be offered to abolish this lamentable evil."

"Till America comes into this measure," [the abolition of slavery] said JOHN JAY, writing from Spain in 1780, "her prayers to Heaven will be impious. I believe God governs the world, and I believe it to be a maxim in his, as in our courts, that those who ask for equity ought to do it."

We content ourselves with quoting further the preamble of the Abolition Act of Pennsylvania.

"When we contemplate our abhorrence of that condition to which the arms and tyranny of Great Britain were exerted to reduce us; when we look back on the variety of dangers to which we have been exposed, and how miraculously, in many instances, our wants have been supplied, and our deliverances wrought, when even hope and human fortitude have become unequal to the conflict; we are unavoidably led to a serious and grateful sense of the manifold blessings which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power, to extend a portion of that freedom to others which has been extended to us, and relieve them from that state of thralldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being delivered.

"We esteem it a peculiar blessing, granted to us, that we are this day enabled to add one more step to universal civilization, by removing, as much as possible, the sorrows of those who have lived in undeserved bondage, and from which, by the assumed authority of the Kings of Great Britain, no effectual legal relief could be obtained. Weaned by a long course of experience from those narrow prejudices and partialities we had imbibed, we find our hearts enlarged with kindness and benevolence towards men of all conditions and nations; and we conceive ourselves, at this particular period, extraordinarily called upon by the blessing which we have received, to manifest the sincerity of our professions, and to give a substantial proof of our gratitude.

"And whereas, the condition of those persons who have heretofore been denominated negro and mulatto slaves, has been attended with circumstances, which not only deprived them of the common blessing they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other, and from their children; an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case. In justice, therefore, to persons so unhappily circumstanced, and who, having no prospect before them, wherein they may rest their sorrows and their hopes, have no reasonable inducement to render the services to society which they otherwise might, and also, in grateful commemoration, of our own happy deliverance from that state of unconditional submission to which we were doomed by the tyranny of Britain. Be it enacted, that no child hereafter born, shall be a slave, &c."

The slave trade was admitted to be an enormous offence against religion and humanity, and power was given to the new Government to abolish it; and when the appointed time arrived, they did abolish it, with the general concurrence of all.

It is manifest, then, that neither any specific provision of the Constitution, nor anything to be gathered from its general intent, nor any sentiment or opinion in the minds of those who framed it, and who were among the greatest men of the country at the time, can warrant the belief that more was expected of the Constitution, and the Government to be established under it, than the prevention of the further importation of slaves from Africa, leaving the States where it already existed, to deal with it as an affair of their own; and it is equally manifest, that the hopes of the wise and the good, the most ardent wishes of the most influential and patriotic men in the country, looked not to the further increase and extension

of slavery, but to its gradual abolition ; and the highest intellects of the country were exercised in the contemplation of means by which that abolition might be best effected.

As significant of the fact that the framers of the constitution considered domestic slavery a condition of things which would be of temporary duration, we ask your attention to this circumstance. While the constitution contains provisions adapted to the actual condition of the Southern States, and to the servitude which existed there, it does not once recognize slavery in terms. The word, slave, is not to be found in that document. That the omission is not accidental, would be clearly and necessarily inferred, from the careful circumlocution by which this class of persons is provided for, without being named.

But we are not left to inference, however irresistible, to enable us to ascertain the reason of the omission. It was declared by a distinguished member of the Convention of 1787.

An act contemporaneous with the formation of the Constitution throws further light upon the purposes of the Fathers of the Republic.

In July, 1787, while the Convention that framed the Constitution was in session, the well known ordinance for the government of the Northwest territory was adopted, with but one dissenting vote, by the old Continental Congress. It provided, as we have seen, for the formation of States out of that territory. It also ordained that there should forever after be no slavery, or involuntary servitude, within it. When it is remembered that this ordinance extended its provisions over all the territories then possessed by the confederated States, out of which new States could be formed, we have, in the form of permanent legislation, a solemn declaration of the purpose then entertained, not to permit slavery to spread beyond its original limits.

The theory that the Constitution was made for the preservation, encouragement, and expansion of slavery ; that every new acquisition which freedom should make on her own soil, through the blessing of Heaven upon toil and enterprise, should be counterbalanced by the incorporation into the body politic of an equal portion of exotic slavery ; and that the decline of the latter, through the operation of beneficent causes, kindly placed beyond the control of man, should be retarded by subjecting to its desolating influence new regions, acquired by purchase, or fraud or force, dates its discovery from a period long subsequent to the establishment of the Government.

Having shown that the Constitution was not designed to uphold slavery, and that such construction of it derives no aid from contemporaneous authority, this Convention finds, in the purposes for which the General Government was established, further insuperable objections to the measure under consideration.

What were those purposes ? They are declared on the first page of the Constitution. They are, to "establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." These are the declared objects for which the Government were ordained. Are any of these ends promoted by the extension of slavery ?

Were there no purpose to enlarge the limits of domestic servitude, were

the Executive and the supporters of his prominent measure content to leave the evil where the Constitution left it, that is within its original bounds, it might seem invidious for this Convention to examine into relations and conditions of things existing in other States of the Union, over which Massachusetts has no control. But it must be remembered that the inquiry now instituted, by this Convention, is forced upon it by an attempt to bring within the protection of the Constitution that which it was never made to comprehend, and to sustain, by its power, a new, because it did not crush, at once, an existing evil. We, therefore, ask the advocates of the extension of slavery, which of the great objects of the Union they expect to promote by the success of their undertaking?

That the cause of justice is not advanced, by the subjugation of one portion of the human race to the despotic power and absolute will of another portion, is a proposition, in the abstract, so manifestly true, that its denial, in few and remarkable instances, is regarded by the common understanding of mankind as the melancholy proof of a disordered intellect.

But, independently of principles of universal application, which prohibit the relation of master and slave, on the ground of infringement of inalienable rights, there are objections to the present scheme for the acquisition of Texas, deserving the grave consideration of all, who would preserve the honor of the country unstained, and its character free from the reproach of seeking its own aggrandizement, regardless of the rights of others.

The history of the revolt of Texas from the parent country, of its conflicts, of the formation of an independent government, and of the maintenance of that government to the present hour, is a history of the achievements of the citizens of the United States upon a foreign soil. The boasted victory of San Jacinto was won by citizens of the United States, aided by soldiers from its army. The declaration of Texan independence was made by citizens of the United States. Among the signers of that instrument, there is to be found but one name of a native inhabitant of Texas or Mexico. The chief offices in the government of Texas, from the beginning, have been held by men long and familiarly known as citizens of the United States.

Nor was the purpose disguised, from the first moment of discontent with the government of Mexico, ultimately to effect a union with this country. As early as 1829, this was publicly declared to be the object in view, by some of the prominent and most influential of the advocates of annexation. And as if to justify and fasten forever upon the country the imputation, that the government of the United States, disregarding the obligations of a solemn treaty of amity with Mexico, had connived at the enlistment, within its jurisdiction, of its own citizens for the army of Texas, the juxtaposition of its own troops to the field of battle, on the eve of an engagement, their secession, and their union with the forces of Texas, and other acts of alleged hostility to Mexico, the avowal has been made to the world, by the Executive and his Ministers that for many years, the successive administrations of the government have sought to enlarge its territory by the acquisition of Texas. The belief that the dismemberment of Mexico was effected for the purpose of strengthening the

institution of slavery in this country, is fortified by the fact of the identity of the immediate causes of that revolution with the objects now sought to be obtained by the annexation of Texas. In the year 1829, the Government of Mexico, by law, abolished slavery throughout its dominions. The preamble to the enactment expresses sentiments and avows motives, which shed lustre upon the noble deed. These are its memorable words:

“Be it known that, in the year 1829, being desirous of signaling the anniversary of our independence, by an act of national justice and beneficence, which may contribute to the strength and support of such inestimable welfare, to secure more and more the public tranquillity, and reinstate an unfortunate portion of our inhabitants in the sacred rights granted them by nature, and that they may be protected by the nation, under wise and just laws, be it enacted, that slavery be exterminated in the republic.”

The new proprietors of Texas, then a Department of Mexico, refused to relinquish their slaves, and assumed the attitude of rebellion against the laws of Mexico.

This Convention disclaims all hostility or unkind feeling towards the Government or the people of Texas. However much it might be desired that the time and manner of its accomplishment had been otherwise, the fact is before us that the independence of Texas has been acknowledged by the constituted authorities of the United States. That its government may be established upon principles that give strength and security to a State, and reality and permanence to its prosperity, and that it may contribute to spread the knowledge and enjoyment of true liberty upon the American continent, is our most earnest wish. These are our sentiments toward Texas, as an independent nation. But, Texas rebelling against the laws of Mexico, which abolished slavery,—Texas, wrested from Mexico by citizens of the United States,—Texas, the support and defence of American slavery,—can never be joined to this Union, but in bonds of mutual infamy.

If, then, justice condemns this measure of the administration, as being at war with all its purposes, we shall look in vain, through this instrumentality, for the attainment of any constitutional object whatever.

We will not ask, lest the inquiry should seem to be made in derision, if, “the blessings of liberty” are to be secured by the enlargement of the limits of Slavery, and the augmentation of its power. That “domestic tranquillity” will not be promoted by the increased strength of its great disturbing cause; and that the safety of a nation in war will not be increased by the presence of a domestic enemy, which holds motionless the arm that would be raised for its defence, are propositions admitting neither argument nor denial.

Throughout the revolutionary war, the weakness of the Southern States, and their inability to furnish a due proportion of soldiers for the army, may be seen by reference to the quotas of troops sent by the respective States in the confederacy, into the service of the country. To place beyond doubt the cause of this inequality, the following testimony is adduced from the records of the Continental Congress.

“March 29th, 1779.—A Committee, consisting of Messrs. Burke, Laurens, Armstrong, Wilson, and Dyer, appointed to take into consideration the circum-

stances of the southern States, and the ways and means for their safety and defence, report, —

That the State of South Carolina, as represented by the delegates of said State, and by Mr. Huger, who has come here by the request of the Governor of the said State, on purpose to explain the particular circumstances thereof, is unable to make any effectual efforts with militia, by reason of the great proportion of the citizens necessary to remain at home to prevent insurrection among the negroes, and prevent the desertion of them to the enemy."

Were the evil consequences of annexation, already alluded to, less formidable, we might point to other and immediate dangers, too great for ordinary prudence to disregard, or, for such an object, to encounter.

The debt of Texas and the war with Mexico must in that event both be assumed by the United States. The former is of uncertain, known however to be of great amount, and is estimated by competent judges at twenty millions of dollars.

Whatever may be its amount, and whatever may be the conditions of union between the countries, that debt must become the debt of the United States. It would be alike inconsistent with the honor of the nation and the rights of others, to annihilate the national character of Texas, assume the revenue accruing from her commerce, and leave the creditor unpaid.

It is equally certain that by a union with Texas, the United States becomes a party in its war with Mexico. With what degree of vigor that war may be carried on by the latter power, and what other nations may become involved in it, time only can determine. That it must despoil our commerce and impair our general prosperity; that it *may* result in hostilities with powerful nations; and that it would be an unnecessary and unjust participation in the conflicts of foreign governments, are considerations too momentous to be overlooked in any fair estimate of the results of annexation.

In a just cause, in the defence of our own rights, the United States may bid defiance to aggression. But to maintain friendly relations with all nations, so far as may be consistent with honor, has been the permanent policy, as it is the obvious interest, of the country. Distant be the day, when, for any object, there shall be a departure from that righteous policy! May that day never dawn, which shall behold the glorious flag of this Union borne in foreign battle fields, to sustain, in the name of liberty, the supremacy of its eternal foe!

This Convention has now, fellow citizens, performed a high and incumbent duty. With all the brevity which the magnitude and importance of the subject will permit, we have laid before you, some of the reasons which impel the people of this Commonwealth to refuse their assent to the formation of a new federal union. Massachusetts denounces the iniquitous project, in its inception, and in every stage of its progress, in its means and its end, and in all the purposes and pretences of its authors. She denounces it, as the overthrow of the Constitution, the bond of the existing Union. She denounces it, as hostile to all the objects for which that Union was established. In the name of religion she denounces it, as a flagrant violation of its revealed principles. In the name of humanity she denounces it, as a deliberate and monstrous machination to secure the unlimited spread and sway of the scourge and curse of the human race.

We address you from Faneuil Hall, the honored place where freemen, in other times, were wont to give bold utterance to their manly thoughts. Around us are the high places where our fathers jeopardied life in the cause of American liberty. The monuments of their devotedness to that cause, even unto death, are in our sight. Their principles are ours. Their spirit animates our hearts, and through us they summon you to the defence of all you hold most dear on earth.

We call upon you, therefore, in their name, and in the name of all the patriots of the Revolution, to stand by us in this day of peril. And we beseech you that you will not permit the declaration they made to the world, on the glorious fourth of July, 1776, to become an object of scorn and derision, by reason of an abandonment of all its principles, even before the last of the generation with which they acted has disappeared from the earth.

Will the South disregard all remonstrance, and press on to its consummation this deed of atrocious wrong? When the Constitution was framed, we have seen, that there was harmony of sentiment among intelligent men in all sections of the country respecting the injurious influences of slavery. Nowhere do we find its evils more faithfully portrayed than in the speeches and writings of eminent men belonging to the slave-holding States, in the early period of our history. The opinions they expressed of slavery have been verified at each step in the progress of the Nation. Withering every interest it touches; paralyzing the strength of States yet in their youth; more desolating than blight or mildew to the soil that sustains it; in all ages and countries, the wrong done to the nature of man, when he is subjected to involuntary servitude, is avenged by the wide-spread ruin his reluctant service repays.

For this unhappy condition of society, the remedy sought to be applied can only aggravate the mischief it would remove. To eradicate the evil, not to disseminate it, is the dictate both of wisdom and philanthropy.

But, whatever may be the policy of the Southern States, upon the question of annexation, surely the appeal to the people of the free States will not be made in vain. Not only the highest obligations of duty bind them to oppose, with all their energies, the extension of a vast moral, political and social evil, but it is clear that no other course is consistent with mere self-preservation.

Their consent is demanded to the introduction into this Union of Slave States, to be formed out of foreign territory. And for what end is this demand made?

The object, we repeat, is undisguised. The purpose is single. It is to control their policy, to make the interests of free labor subservient to the necessities of an artificial, unthrifty, unnatural and unjust condition of society. It is to force industry out of the paths which lead to abundance and prosperity, because those paths are open only to the feet of freemen.

During the whole existence of the General Government, hitherto, Southern principles have had an almost unbroken sway. This has been felt in ruinous changes of public policy, seemingly capricious, but really intended, through all its changes, to discourage the industry of the free States, derange their business, and depress them to the level of communities in which all labor is held to be degrading, except that which is extorted from unwilling hands, by the lash of usurped authority.

It has been perceived that the night of this iron dominion was passing away. The energies of freemen, put forth in submission to the laws of Providence, have overcome all obstacles, and opened the way for the growth, prosperity, and power of the free States.

No sooner is that power beginning to be felt in the protection it extends to the interests which created it, than a gigantic effort is made to reduce it, again and forever to subjection.

The free States are called upon to assist in forging the chains that are to bind them. By the help of craven and treacherous Representatives of these States, the foul deed, if done at all, must be accomplished. But that Representative of a non-slave-holding State, who shall be so lost to all his obligations to earth and Heaven, as to yield his consent to a measure pernicious to one, and offensive to the other, will live, while he lives, the object of scorn and loathing to all lovers of liberty and of man; and when he shall have perished from the earth, the history of this iniquitous act will be the lasting memorial of his infamy.

In conclusion, fellow citizens, we call upon you to unite with us in prompt, vigorous and unceasing hostility to this scheme of annexation. Whatever may be its fate in the present Congress, it will never be abandoned while a hope of success remains. The patronage of office, and the appliances of corruption, and all the energies of desperation will be combined for its accomplishment. Let, then, the power of truth and justice, the love of liberty, a determination to preserve the institutions of free Government, and a regard for the well-being of the country, unite all honest and patriotic men, in one mighty and persevering effort for its overthrow. Let public sentiment be everywhere enlightened in respect to the origin, history, and objects of the measure of annexation. Let it be the all-engrossing theme, by the fireside and in the field; and let the people of every State assemble and denounce it. Let the sentinels of the press slumber not; but, with unceasing vigilance, watch the approach of danger, and sound the loud alarm. And may that Providence which established, and has hitherto protected, our beloved country, preserve it from guilt and ruin!

The Duties of the Whig Party

WASHINGTON, March 19, 1845.¹

A MEETING of Whigs from various parts of the Union, including nearly all the Whig members of the Senate, was holden in this City, on the 15th instant, for the purpose of conversing on the State of the country, & the duties incumbent on the Whig Party.

The meeting was adjourned from day to day, and on these successive occasions, full discussion, & free interchange of opinions took place, which led to the following Results, adopted with entire unanimity.

1st. That the Constitution of the United States, the honor and security of the Country, and all its great interests, can only be preserved, by maintaining the leading principles and supporting the leading measures of Policy, of the Whig Party ; and that it is the duty of all Whigs to act steadily on these principles, and to sustain these measures, trusting, that in the end, just sentiments may become generally prevalent, in the Country.

2d. That there is abundant reason to believe, that the late Election of President & Vice President was carried against the Whig Candidates, by fraudulent practices, and illegal votes ; & that the Whig Party does, in fact, at this moment, comprize a majority of the legal electors of the United States.

3rd. That notwithstanding the unfortunate and unexpected result of the late Elections, no reason exists for despairing of the Country. That it is evident, that while the Whig Party failed in its attempt to elect its own Candidates, Whig Principles, nevertheless, made progress, and obtained acceptance

¹ From a manuscript, in Mr. Webster's handwriting, owned by Hon. George F. Hoar.

among the People, to a very gratifying and exemplary degree. That the great duty of the Whigs is a Consecration duty ; the duty of holding on to their principles, maintaining union and confidence among themselves, sustaining their organization, in the several States, and renewing & increasing, instead of slackening, their efforts to enlighten the public mind, on great national questions.

4th. That the present moment is one that calls particularly for attention and action ; inasmuch as seventy or eighty members of the House of Representatives in Congress, & no less than Seven Senators, who will take their seats at the next session, are yet to be chosen.

It is obvious that these elections *may* decide the character of one House, & that they *must* decide that of the other.

5th. Finally ; that nothing of misfortune or disappointment in the past, nothing of discouragement in the circumstances of the present, & nothing of gloom or doubt in the prospects of the future can release the Whigs of the Union from a conscientious, zealous & persevering discharge of the duties, which they owe to their Country.

In conclusion, it was agreed that Mr. Webster, Mr. Berrien, Mr. Dayton, Mr. Johnson of Maryland, and Mr. Corwin should be requested to cause these results of the deliberations of the Meeting to be made known to the Whig friends, in the several States, in such manner as they might think advisable, & to confer with them in drawing to the subject, the consideration which its importance demands.

To carry that purpose into effect, we have signed this paper, to the end that each of us may transmit copies, in his discretion, to proper persons, in the various parts of the Country, and by correspondence, or personal interview, confer on the measures most likely to accomplish the great object in view.

DANL WEBSTER.¹

¹ The manuscript bears the signatures of seventeen others, among them being W. P. Mangum, J. J. Crittenden, J. M. Berrien, Reverdy Johnson, &c.

Memorandum on the Ingersoll Charges

1846.¹

MR. INGERSOLL'S 3 charges.

1. Unlawful use of the contingent fund.

I wholly deny it—The Statement is indistinct, but substantially false.

1. I had no power of directing the money to be placed in my hands.

The course was this. Very important things were pending, calling for small expenditures out of the fund, from time to time. The President saw fit to give an order for small amounts, from time to time, to be accounted for, by me, as vouchers were rec^d—, leaving no considerable sums in my hands, at any time; although it would of course sometimes happen, that sums were paid & vouchers not rec^d till afterwards. The President never gave a Certificate to cover a dollar, till he was satisfied— & I only took them to show him that the money had been duly applied, to objects stated & approved by him. We were of course careful to get such vouchers, as if we were to settle an account before an auditor. All was confidential & intended to be secret.

Then, in the first place, it is not true that *I directed* the Accountant to place money in my hands. The direction was the President's.

2^d There never was such a sum as 15,000, or any thing like it in my hands at once. When one small sum was exhausted,

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society. See *Life of Daniel Webster*, by Geo. Ticknor Curtis, Vol. II. pp. 265-284.

or new uses were expected, the President directed the necessary payment to me, & not otherwise. I know not how this alleged sum of 15,000 is made up: as it is three times as much as the whole amt. covered by the President's Certificate, while I was Secretary of State.

3. It is utterly false that I ever drew a dollar, of which the President was ignorant. I could not draw a dollar, of my own authority, & never did. Nobody but the President had authority. He is disbursing agent of this fund. See opinions of Atty. Genl.

4. The money paid to Mr. Crittenden was paid by order of President Harrison, in March 1841. It probably stood, without a voucher, for some time, but afterwards Mr. Crittenden's receipt was taken, the item carried to the *public* account of the expenditure out of the Contingent fund, & was published, in course, in the Treasury accounts. This is as I remember that transaction.

5. Alexander Powell's employment was in 1841.

It was of a secret nature, & it is altogether wrong, & a breach of the faith of Gov^t to publish his name. He rendered valuable services at the frontiers, connected with the preservation of the peace of the Country.

6. F. O. J. Smith's employment was in 1842. F. O. J. Smith never was sent to the Frontier. He was employed, in the negotiation at Washington, 1842.

7. Mr. Ingersoll says; there is a credit of cash returned, \$5,000 — & asks why return it, if taken for a *public* purpose? The answer is, simply, because it turned out not to be wanted. Not being wanted it was of course to be "returned," & not kept.

—I have no recollection of this, but if such a "return" appears, that must have been the reason.

8. As to the balance of \$2,290 agt me, on the "closing of my accounts."

This cannot be true. If it means only, that at a particular time this sum was not covered by vouchers, it may be so, or it may not; but if it means that this sum was a balance in my hands after deducting all payments actually made by me, & all charges on the fund, then it is not true.

9. As to the \$17,000 dollars said to be in my hands, "agt. former usage," I can only say that I know not how it is pretended that this amt. is made up; nor do I know what the "former usage" was. I only know that I acted as the President directed; applied all that was applied, to objects authorized by him, & rendered him such returns & vouchers, as satisfied him, as to all amounts which were to be covered by his Certificate.

10. Corrupting the *Party Press* (what Party?) As to this, I can only say that I never directed a dollar to be paid to any Editor, Printer or other person connected with the press. — I have no recollection of any such letter as is said to be found from Mr. Smith — Nor has he any letter from me, requesting or approving any "corrupting of the Party Press." — Mr. Smith had been a member of Congress; was a respectable man in Maine, & had the confidence of the leading public men, & the popular party. His services were thought to be important; they were all honest, so far as I know, and I am sure, so far as I intended. It cannot be right, unless in a case of *high importance* to drag his name before the public, as connected with a transaction in which the *law* promised him confidence & secrecy.

As for my justification, it is enough to say, that in all the other cases, the money was paid by the President's direction.

11. I do not remember the report of Mr. Rogers — I recollect purchasing various maps & charts — Some of them at high prices — one especially — which I had become acquainted with in 1838 — & which I learned the British Consul then wished to buy — at almost any price, as it had a *red line* on it — supposed to have been placed there, by Mr. *Jay*. I bought this, at my own risk, in 1838 — afterwards gave it to the agent of Maine, Mr. C. S. Davis, who paid for it. At the time of the Treaty it was sent to the Dep^t — Mr. Davis was refunded what he had paid for it — & the map is now in the Dep^t

My correspondence with Mr. Stubbs, & the papers will show how the account was settled. The President never wrote me on the subject at all. I believe Mr. Stubbs said, in one letter, that the President was anxious to see the account settled — which was very proper. Mr. Tyler was cautious, as to mak-

ing expenditures from the Contingent fund, — & used much less of it than his predecessors. See his letter to me.

The proposed retraction which follows is in the handwriting of T. Butler King down to the words "Mr. President," and from that point in the handwriting of Robert C. Schenck. This paper and the two letters which follow it are printed from the original manuscripts in the New Hampshire Historical Society.

Whereas the Honorable Charles J. Ingersoll, in his speech on the Oregon question in the House of Representatives on the 9th of February last, made certain charges against the Honorable Daniel Webster respecting a private correspondence alleged to have taken place between him and the Governor of the State of New York in March, 1841 on the subject of the imprisonment of Alexander McLeod; and Mr. Ingersoll on the 9th instant, in the House of Representatives made other charges against Mr. Webster respecting certain alleged transactions in the Department of State, and Mr. Ingersoll having made known to the undersigned that those charges were founded on information which he has ascertained to be entirely without foundation in truth and feeling a desire voluntarily and promptly to do ample justice to Mr. Webster, it is proposed by Mr. Henry D. Foster of the House of Representatives, on behalf of Mr. Ingersoll, that [the] latter will rise in his place in the House to day and make the following statement, to wit, "It will be recollected by the House that in my remarks on the Oregon question on the 9th of Feb'y last I made certain charges against the Honorable Daniel Webster respecting a private Correspondence which I had been led to believe had taken place between him and the Governor of the State of New York in the month of March, 1841, respecting the imprisonment of Alexander McLeod. It will also be recollected by the House, that on the 9th instant I made other charges against Mr. Webster alleging that certain transactions had taken place in the State Department at the time he was Secretary of State. Now in justice to Mr. Webster and to myself I embrace the earliest opportunity to say that the charges to which I have referred were founded on information which I have since ascertained to be erroneous — that I was entirely misinformed — and that I therefore withdraw those charges altogether, and with pleasure retract any derogatory expressions towards Mr. Webster made on either occasion, by which they may have been accompanied." It is therefore proposed on behalf of Mr. Webster by T. Butler King and Robert C. Schenck of the House of Representatives that on to-morrow, Tuesday, the 14 inst — That Mr. Webster with the published remarks of Mr. Ingersoll before him — will rise in his place in the Senate and say: — "Mr. President; — "It was with unaffected pain, as I then stated, that in the remarks which I made in debate here a few days ago, in reply to the Hon. Senator from New York (Mr. Dickinson), I felt compelled to notice & comment on a speech made by the Hon. Charles J. Ingersoll of the House of Representatives, an extract from which had been published by the Senator from New York with his speech. Now sir, I recur to that subject for another & more agreeable purpose.

I find in the report of proceedings yesterday in the House of Reps. as published in the Union newspaper of last evening, that Mr. Ingersoll has done me the justice to state publicly, in explanation to the House, that the charges which he had made against me in that speech of his on the 9th of February last, in relation to a correspondence with the Gov. of New York in 1841, as also other charges & averments, in relation to my conduct when I was Secretary of State, which he made in the House of Reps. on the 9th of this month, on occasion of his offering a certain resolution of inquiry as to the expenditure of the secret service fund, were founded on information which he has since ascertained, & become satisfied, was entirely erroneous; & that he has withdrawn therefore altogether those charges as groundless, & has retracted the expressions derogatory to my character with which they were accompanied. In this state of the case I am ready to meet that retraction of Mr. Ingersoll in a like spirit. I take this opportunity therefore of saying to the Senate, that my remarks & comments upon Mr. Ingersoll & his speech which I made here, having been founded entirely upon his charges & averments in regard to myself, the occasion being taken away, those remarks & comments fall to the ground; & may be forgotten with the cause & circumstances which produced them — ”

This paper was drawn up after a conference and conversation between Mr. Henry D. Foster; who had been requested by Mr. Ingersoll to act for him — and myself. After it was drawn I placed it in Mr. Foster's hands to be shown to Mr. Ingersoll. In a day or two he returned it, saying that Mr. Ingersoll thought that Mr. Webster should begin any explanation, which might take place. I told him that was impossible. Two or three days afterwards the subject was again revived between us, and terminated in a similar result. On none of these occasions did Mr. Foster, say or intimate, that Mr. Ingersoll had any objection to make declaration, which in this paper it was proposed he should make, provided Mr. Webster would begin the explanation. To this Mr. Schenck and myself decidedly objected, and therefore my intercourse with Mr. Foster, on this subject, ceased.

T. BUTLER KING.

I acted with Mr. King, in behalf of Mr. Webster, in the attempt to adjust the difficulty between Mr. Webster & Mr. Ingersoll — wrote the latter part of the paper prepared for that purpose as above — was present at the second named interview with Mr. Henry D. Foster, & concur with the statement of Mr. King in relation to what then transpired. Mr. Foster said, Mr. Ingersoll thought that Mr. Webster should make the first explanation — this Mr. King and I agreed was inadmissible. Mr. Foster made no other objection, in my hearing, to the form or terms of the adjustment proposed.

ROBT. C. SCHENCK.

On the Vote of Spencer Jarnagin, a Senator from Tennessee¹

MR. JARNAGIN has been an industrious and vigilant member of the Senate. In the resistance of that "annexation" which has brought lamentable war and disastrous public debt in its train — opposition to which measure was highly perilous to him at home — Mr. Jarnagin bore an effective and honorable part. His position, last year, as to the New Tariff (the present adroit companion of a war) made him again conspicuous.

He has undoubtedly felt himself restrained, *in his conduct in the Senate*, by *Legislative Instructions*, an authority, which in forty years experience, we have hardly known to be once used for any real good purpose or object. We embrace the occasion to remark how differently such proceedings as Instructions, pledges by Representatives to their constituents, and all sorts of out-door commitments, strike different minds. Last year a member of the French Chamber of Deputies was actually *expelled the Chamber* because he had promised his constituents to vote in a particular way, on a question interesting equally to the whole Kingdom. The general sense of the Chamber was, that one who had already made up his mind, and engaged his vote, in a particular way, was not fit to sit in a Council, assembled for deliberation, and mutual consultation on high matters of state, being like a judge, who had prejudged the case, or a juror, who had already made up his mind. Mr. Guizot's speech on that occasion does not read much like one of the homilies which we so often see, upon the right

¹ From the *National Intelligencer*, March 13, 1847. The original manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch.

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of constituents to instruct, and the duty of Representatives to obey. Of all bodies, it has always appeared to us, that the Senate of the United States should be most perfectly free from all influences ; simply because the vote of every Senator affects the interest of other states, just as much as it affects those of his own. Why should he, who is to act for the whole, take his rule of action from a part, and it may be, much the smallest part, of those concerned in the consequences ? If Mr. Jarnagin had felt himself free from the restraint of instructions, he would no doubt have voted against the Tariff act of the last session ; and in so doing, we fully believe, would have conformed to what is, *at this time*, the sentiment of the People of Tennessee.

The Militia and Presidential Power

JANUARY 14, 1847.¹

THE Militia, is the Militia of the several States, & is not an armed force, belonging to the Gen^l Govt.

Nevertheless, the Constitution of the United States gives Congress power "to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, & repel invasions."

The Act of Congress of the 28th of February, 1795, was passed, in order to carry this Constitutional power into execution. It enacts, "That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation, or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State, or States, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such

¹ An opinion given to Sherrod Williams, a member of the Kentucky Legislature, 1842, and Chairman of the Committee on Federal Relations, to whom had been referred the subject of the Constitutional right of the President of the United States to appoint the Commanders of the State volunteer militia in the war with Mexico. He wrote to Mr. Webster January 14, 1847, enclosing a copy of the Resolutions, and asked for Mr. Webster's views. The Resolutions are as follows:

1. Resolved, that the Committee on Federal Relations inquire into the Constitutional power of the President of the United States to appoint and commission officers of any grade in the Volunteer Militia, when called into the service of the United States.

2. Resolved, further, that the said Committee inquire whether in the late exercise of that power by the President of the United States, the Constitution of the United States and the rights of the States have not been encroached upon.

The paper is printed from the draft, in Mr. Webster's handwriting, in the New Hampshire Historical Society. It bears the following endorsements: "Copy of letter to Hon. Sherrod Williams," and, in pencil, in another hand, "Jan. 14, 1847."

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invasion, & to issue his orders for that purpose to such officer or officers of the militia as he shall think proper."

Similar power is given to the President by the same act, in cases of insurrection, to call forth the militia, on the application of a State; & also to call forth the militia, when necessary, to execute the laws of the United States.

The President has the power of deciding when an invasion exists, or is threatened, so as to make it proper to call out the militia.

This power was frequently exercised, during the last war with England. On the call of the President, it is the duty of the Executive Government of the State to order out Militia, in Regiments, Battalions or Companies, as called for; & the troops so ordered out, are bound to obey.

This is the only *compulsory* military service at present known to our Laws; all enlistments into the army being *voluntary*.

The power of the President to call forth the militia being limited by the Constitution, and the Act of Congress, to the three specified cases of Invasions, Insurrection or forcible resistance to the Laws, it has not been resorted to in the present war with Mexico, because the service is a foreign service.

The volunteer Regiments, Battalions, & Companies, which have tendered their services, & been rec^d, in carrying on the present war, are placed on a peculiar ground. They do not belong to the regular Army of the United States, nor are they militia, called out in pursuance of the Constitutional provision.

They are voluntary Corps, either such as were previously organized under the Militia Laws of the State, or such as have been formed and organized for the occasion. In either case, they are officered by the State Gov^t. But then the law of last Session enables the President to appoint Superior officers, to command the Volunteer Corps. It is difficult to say that this is unconstitutional; because the whole matter originates in a call, which leaves it optional with the militia to come forth or not. The whole proceeding is rather anomalous, as the troops are not regular troops, nor are they militia, called for, & ordered out, to meet the exigency provided for by the Constitution. In short, this invitation for the service of Volunteer Corps, is but a mode of raising expeditiously, a temporary, or

provisional Army, destined for a short service. It is officered, in general, by the State authorities; and should be so, in all cases, as far as possible; yet, as the service is voluntary, as the Militia Corps may enter into it, or not, at its pleasure, I cannot say that it is unconstitutional for the Gen^l Gov^t to retain & exercise the power of appointing the High Field Officers who shall command them, or to place them under the command of officers of the regular Army.

This mode of raising troops is suited only to such occasions as are expected to require only short service. Toward the end of the late war with England, & when it was feared the war might still last, for some time, the volunteer system was pretty much given up; so inconvenient was it found for troops, serving under State commissions, to be acting, for any great length of time, mixed up with, & subordinate to, troops of the regular Army.

The great advantage of the Volunteer service, is, that it is generous, & patriotic, entered into more for the hope of honorable distinction, than from the hope of pay; & that it gives men, what they like, an opportunity of bearing arms, under officers of their own choice. This should be preserved so far as possible, so long as the volunteer system is resorted to at all. If the system is voluntary, let it be voluntary throughout. Let the Volunteer Corps have a voice, in the appointment of their highest, as well as their lowest officers. Let him be known to them, & be an object of their confidence who is to lead them to the cannon's mouth or to the walls of the enemy's fortifications. To place others, by the appointment of the President of the United States, over the heads of their own officers, degrades the volunteers & depresses their patriotic ardor. They take the field, with the proud hope of serving their country & doing honor to themselves. As their objects are not mercenary, so their character & condition should [not] be subordinate. If, in a moment of emergency & peril, their patriotism & love of country have called them to arms, let the honors, as well as the dangers of the field, be theirs. In the past conduct of the Volunteer Corps, we find ample assurances for the future. Never did officers or men submit to evils & privations more patiently; never did officers or men, behave

The Militia and Presidential Power 225

more gallantly before the enemy. The veterans of years, have not stood more firmly under a raking fire from the enemy's batteries, or plunged, more daringly, in the closest, thickest, & hottest personal conflicts with the foe.

It may be that those are right, who think that it would have been better, if the Volunteer Corps had been raised, by direct enlistment, for a short period, with a right to designate their officers, but such officers, nevertheless, to be commissioned by the President of the United States, thus raising a provisional army, enlisted for a short period, with officers designated by themselves, instead of accepting the service of the militia, in bodies already existing, or organized for the occasion. But the Gov^t has not adopted this course; it has called for Militia Volunteers; & having done so, & invited them into the field, [there] ought not to be withheld from them any part of the honors or distinctions to which they are so well entitled.

In the opinion of the Committee, the House ought to adopt the following Resolutions:

Resolved. That in accepting Volunteer Militia corps into the service of the United States, it is consistent with the true spirit of the Constitution, that the officers of such corps, of every grade, should be commissioned by the State authorities.

Resolved. That for the purposes of a war the employment of Volunteer Corps, is the best & safest mode of raising troops; most consistent with our Republican Institutions, most agreeable to the People, who regard large standing armies as dangerous & especially important, as it prevents the accumulation of an enormous military patronage in the hands of the President of the United States —

The Question Settled

AUGUST 10, 1850.¹

IN a long course of editorial life, it has seldom fallen to our lot to enjoy a greater pleasure, in announcing a public event, than we experience to-day in announcing that which, if we could we would spread over the whole country in a breath, — the passage through the Senate of the Bill to settle the Texas Boundary Question. Considering this the most difficult of all the questions growing out of our Mexican acquisitions, and its adjustment as decisive of the early settlement of the remaining points of controversy, we confess to the uncommon degree of joy with which it fills us. Hail, Liberty and Union, and Domestic Peace! Hail, Liberty and Union, and every great interest of the country! Hail the return of the Government from its long aberration back to its just sphere of action and usefulness!

Our first feeling is certainly one of thankfulness to Providence for this important first step in the restoration of National harmony. Our next sentiment is one of high respect and gratitude toward those who have persevered with such unflinching resolution through this most trying struggle of the last six months, “unseduced,” “unterrified.” They have encountered great responsibility and they have encountered it cheerfully: they have made great personal sacrifices — at least some of them, — and they have made such sacrifices promptly, and with entire disregard of personal consequences. Distant, far distant, be the day when such patriotic efforts, sustained by such extraordinary ability and energy, will be forgotten by the people of the United States.

¹ Printed in the National Intelligencer. Mr. Webster, in a letter to his friend, Mr. Franklin Haven of Boston, August 10, 1850, said: “I gave ten minutes to the preparation of an Editorial for the Intelligencer, which you will see in the paper of this morning.”

We do not undertake to recite the precise terms of the healing measure which has now passed, for we do not yet know them; and, in truth we do not care to know them. It is enough for us that the bill was carried by three-fifths of the votes of the Senate, confined to no section or party.

It is a happy circumstance that the bill was so wisely framed and matured, as to subdue so many sectional prejudices, and harmonize so many conflicting views; and we heartily congratulate Mr. Pearce, on the success which has crowned his efforts. We feel justified also in congratulating the friends of the Administration that this happy adjustment has so speedily followed the wise and conciliatory recommendation of the President to Congress on this perplexing and menacing subject.

It now only remains that the great popular branch of the Legislature should follow up this noble work, and complete it. We confidently trust they will do so. We fully believe that in a few days we shall be able to announce that this, and other healing measures have become laws. That is the consummation most devoutly to be wished. Then, indeed, would this great and glorious republic be once more

“Whole as the marble, founded on the rock,
As broad and general as the casing air.”

The Important Week

AUGUST 26, 1850.¹

CONGRESS has now commenced the week which is to witness the fate of those vastly interesting measures which have engrossed its attention for nine months. The Senate, after a series of debates, never surpassed in that body or elsewhere for ability, earnestness, and patriotism, has presented the glorious results of its labors to the other branch of the National Legislature. The peace of the Country is now in the hands of the House of Representatives: and if it be found not to be safe in those hands, a blow, irreparable in its consequences, will be struck, not only on the prosperity and happiness of the people of the United States, but upon the great cause of popular freedom throughout the world. For, if this Union cannot be preserved, and the Government established under it maintained, it will be demonstrated that there cannot exist among men a free powerful representative Government over a country of large extent. Petty Republics there may be; small States may continue to exist, and to enjoy free institutions by the permission of their neighbors; but the experiment of a great Republican Government, formed by the union of Independent States, and clothed only with such powers as concern the common defence and general welfare, and leaving all local legislation to the States themselves, will have failed, and failed under such circumstances as will forbid all idea of its repetition.

That the House of Representatives will rightfully discharge the momentous duties which it has now to perform, we confidently believe. Recent occurrences have been calculated to

¹ Published in the National Intelligencer. The manuscript, in Mr. Webster's handwriting, is in the New York Public Library, Lenox Branch.

dispel doubts, and to reassure the best hopes of the friends of the Union. In the first place, the example of the Senate is a bright and shining light, upon which members of the other House are not likely to turn their backs. In the next place, the recommendation of measures of conciliation and peace by an Administration which possesses, at the present moment, in a high degree, the public confidence, will not pass altogether unheeded. But the influence of these external considerations needs not to be relied on. The power which is to carry the pending measures through the House of Representatives is their own propriety, their own justice, their own necessity. They move by a force inherent in themselves. Their objects every man sees, and every patriotic man loves. Those objects are peace, harmony, and the security of the Union; and in the march of measures, having such ends in view, and suitable to the attainment of such ends, not only will all small obstacles be crushed, but mountains will give way: the North will give up, the South will not keep back; there will be a surrender of individual preferences and personal opinions, and the flocking together of patriotic purposes and true American feelings, such as shall render this last week of August, 1850, ever memorable in the annals of the country.

These are our hopes, and this our belief, as to the issue of these questions. We have faith, full faith, in the intelligence and integrity of the House of Representatives.

But this is not all. "There is a power behind the throne," exclaimed Lord Chatham, "greater than the throne itself." In a constitutional monarchy, this is an omen of ill. But in a popular, representative Government, it is no omen of ill that there is behind Legislative bodies and Executive bodies, a power greater than those bodies themselves; and that power is the known will of the People. What that will is, in the present crisis, is not doubtful. No jarring or discordant sounds reach the ear. There is an imperative unity in the public voice, such as was hardly ever known before, such as no man can mistake, and no wise man will disregard. We use terms not too strong, when we say that the cry of the country is for the adoption by the House of the bills of the Senate, one and all. In forty years' experience we have not known public opinion more clear,

united, and decisive. We suppose our means of knowledge, in this respect, as good as those of most others who, like ourselves, are confined to one place; and we aver our conviction that a vast majority of the People look for the salvation of the country to the sanction to be given by the House to the measures of the Senate. All manifestations of sentiment show this. The Press, from every quarter, teems with proof; the results of public meetings on the subject, wherever holden, proclaim it; every man we see, and who has come hither, by the railroads and steamboats, from the extreme margins of the country, declares that he has heard the expression of but one opinion, and one hope; and that opinion not faint and hesitating, but firm and strong, and that hope earnest, anxious, and enthusiastic.

It is not, therefore, to be doubted that, if nothing occur to mar the prospect, the bills which have passed the Senate will pass elsewhere, and become laws. The members of the House of Representatives are servants who know their lords' will, and who mean to do it.

There is, indeed, one possible danger. The pending measures are in separate bills, and some of them are more warmly espoused or more cheerfully supported by one part of the country than by others. It is possible that, on this account, a contest about priority may spring up, aided or instigated, on the one side or on the other, by those few in whose hearts the root of bitterness is still so rank as to leave place for nothing but purposes of mischief. Any such contest would be most deeply to be deprecated. If, in all humility, we might presume to address a word of advice, or, perhaps, more appropriately, of request and supplication to the friends of the measures in the House of Representatives, we should say, "Have confidence in one another. Confidence! Confidence! Let no distrust disturb your counsels! If there be any controversy, let it be that controversy, so patriotic, so becoming, so graceful, in which the point shall be who shall be most ready to give confidence in advance." How cheering it would be to hear it said on all sides, "We act upon honor and in good faith; we know that you act upon honor and in good faith. Let us take up the measures, then, as they arise, orderly and in the regular course of proceeding, and dispose of them. Neither our cheeks nor

yours shall hereafter be crimsoned by blushes, caused by the recollection of faith violated or honorable understandings left unfulfilled."

We must bring these remarks to a close; but, as we hardly knew where to begin, so we hardly know where to end. What we have said, we trust will be regarded as written in no spirit of dictation, distrust, or disrespect. Our responsibilities, in comparison with those of others, are inconsiderable; yet we have felt that we had a duty to perform, and we have endeavored to discharge it, in a very feeble manner certainly, by giving utterance to the sentiments expressed in this article. For ourselves, we feel that, if our lives and our labors should be prolonged to a far more distant period than it is probable they will be, we shall never address our readers on a subject of more vital importance to the honor and happiness of the People of the United States.¹

¹ The "Compromise Measures" were passed by the Thirty-first Congress before its adjournment September 30, 1850. They included an Act for the admission of California as a State, with the "free" Constitution adopted by its people, the Texas Boundary Bill, the Fugitive Slave Bill, an Act for the organization of the territories of New Mexico and Utah, and an Act excluding slavery from the District of Columbia.

Cabinet Circular

OCTOBER, 1850.¹

THE open manner in which disunion, secession, or a separation of the States, is suggested and recommended in some parts of the country, naturally calls on those to whom are confided the power and trust of maintaining the Constitution, and seeing that the laws of the United States be faithfully executed, to reflect upon the duties which events not yet indeed probable, but possible, may require them to perform. In the Northern and Eastern States, these sentiments of disunion are espoused principally by persons of heated imaginations, assembling together and passing resolutions of such wild and violent character as to render them nearly harmless. It is not so in other parts of the country. There are States in the South in which secession and dismemberment are proposed or recommended by persons of character and influence, filling stations of high public trust, and, it is painful to add, in some instances, not unconnected with the Government of the United States itself. Legislatures of some of the States have directed the government of those States to re-assemble them in the contingency of the passage of certain laws by Congress. While these occurrences do not constitute an exigency calling for any positive proceeding either by the Executive Government of the United States or by Congress, yet they justly awaken attention, and admonish those in whose hands the administration of the government is placed, not to be found either unadvised, surprised or unprepared, should a crisis arrive. The Constitution of the United States is founded on the idea of a division

¹ This paper Mr. Webster wrote while a member of President Fillmore's Cabinet, intending to send it to all United States officers, but the Cabinet objected and it was not made public at the time. The paper was found at Marshfield after Mr. Webster's death, and printed in "The Webster Centennial," published by The Webster Historical Society in 1882.

of power between the general government and the respective State governments ; and this division is marked out and defined by the Constitution of the United States with as much distinctness and accuracy as the nature of the subject and the imperfection of language will admit. The powers of Congress are specifically enumerated, and all other powers necessary to carry these specified powers into effect are also expressly granted. The Constitution was adopted by the people in the several States, acting through the agency of conventions chosen by themselves ; the Legislatures of the States had nothing to do with this proceeding, but to regulate the time and manner in which these conventions thus chosen by the people, the true source of all power, should assemble. The Constitution of the United States purports to be a perpetual form of government ; it contains no limits for its duration, and suggests no means and no form of proceeding by which it can be dissolved, or its obligations dispensed with ; it requires the personal allegiance of every citizen of the United States, and demands a solemn oath for its support from every man employed in any public trust, whether under the Government of the United States, or any State government. This obligation and this oath are enjoined in broad and general terms without qualification or modification, and with reference to no supposed possible change of circumstances or events.

No man can sit in a State Legislature, or on the bench of a State court, or execute the process of such court, or hold a commission in the militia, or fill any other office in a State government, without having first taken and subscribed an oath to support the Constitution of the United States. Without looking, therefore, to what might be the result of forcible revolution, since such cases can, of course, be governed by no previously established rule, it is certainly the manifest duty of all those who are entrusted with the Government of the United States in its several branches and departments to uphold and maintain that government to the full extent of its constitutional power and authority, to enact all laws necessary to that end, and to take care that those laws be executed by all the means created and conferred by the Constitution itself. We are to look to but one future, and that a future in which the

Constitution of the country shall stand as it now stands ; laws passed in conformity to it to be executed as they have hitherto been executed, and the public peace maintained as it has hitherto been maintained. Whatsoever of the future may be supposed to lie out of this line, is not so much a thing to be expected, as a thing to be feared and dreaded, and to be guarded against by the firmest resolution and the utmost vigilance of all who are entrusted with the conduct of public affairs ; no alternative can be presented which is to authorize them to depart from the course which they have sworn to pursue. In conferring the necessary powers on the general government, it was foreseen that questions as to the just extent of those powers might occur, and that cases of conflict between the laws of the United States and the laws of individual States might arise. It was of indispensable necessity, therefore, that the manner in which such questions should be settled, and the tribunal which should have the ultimate authority to decide them, should be established and fixed by the Constitution itself ; and this has been clearly and amply done. By the Constitution of the United States, that instrument itself, all acts of Congress passed in conformity to it, and public treaties, constitute the supreme law of the land, and are to be of controlling force and effect, anything in any State constitution or State law to the contrary notwithstanding ; and the judges in every State, as well as of the courts of the United States, are expressly bound thereby. The supreme rule, then, is plainly and clearly declared and established : it is the Constitution of the United States, the laws of Congress passed in pursuance thereof, and treaties made under the authority of the United States. And here the great and turning question arises, Who in the last resort is to construe and interpret this supreme law ? If it be alleged, for example, that a particular act of a State Legislature is a violation of the Constitution of the United States, and therefore void, what tribunal has authority finally to determine this important question ? It is evident that if this power had not been vested in the tribunals of the United States the government would have wanted the means of its own preservation ; all its granted powers would have depended upon the variable and uncertain decisions of State courts.

It is a well-established maxim in political organization, that the judicial power must be made co-extensive with the constitutional and legislative power ; otherwise there can be no adequate provision for the interpretation and execution of the laws. In conformity with this plain and necessary principle, the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties, no matter in what court such a case arises. Whenever and wherever such a case comes up, the judicial power of the United States extends to it, and attaches upon it ; and if it arise in any State court, the acts of Congress have made provisions for its transfer to the Supreme Court of the United States, there to be finally heard and adjudged. This proceeding is well known to the profession, and need not now be particularly stated or rehearsed. Finally, the President of the United States is by the Constitution made commander-in-chief of the army and navy, and of the militia when called into the actual service of the United States ; and all these military means are put under his control in order that he may be able to see that the laws be faithfully executed. The Government of the United States, therefore, though a government of limited powers, is complete in itself, and, to the extent of those powers, possesses all the faculties for legislation, interpretation and execution of the laws, and nothing is necessary but fidelity in all those who are elected by the people to hold office in its various departments to cause it to be upheld, maintained and efficiently administered.

The Constitution assigns particular classes of causes to the original jurisdiction of the Supreme Court, and other courts are to exercise such powers and duties as are or may be prescribed by Congress. Congress has not as yet found it necessary or expedient to confer on the circuit or other inferior courts all the jurisdiction created or authorized by the Constitution ; thus there are many cases in which a summary jurisdiction usually belonging to courts, such as that of mandamus and injunction, are not provided for by general law, but some such cases are provided for. Thus by the act of March 2, 1833, it is declared that the jurisdiction of the Circuit Courts of the United States shall extend to all cases in law or equity arising under the

revenue laws of the United States ; and if any person be injured in his person or property on account of any act by him done under any revenue law of the United States, he may bring suit immediately in the Circuit Court of the United States ; and if he be sued in any State Court for such act, he may cause such suit to be immediately removed into the Circuit Court of the United States ; and if the State court refuse a copy of its record, that record may be supplied by affidavit ; and if the defendant be under arrest, or in custody, he is to be brought by *habeas corpus* before the Circuit Court of the United States. Under the first part of these provisions, writs of mandamus and injunction may be issued, and all other writs and processes suitable to the case ; and any judge of any court of the United States is authorized to grant writs of *habeas corpus* in all cases of prisoners committed or confined for any act done in pursuance of a law of the United States, or of any order, process or decree of any court of the United States. These provisions are all found in the permanent sections of the act of Congress already referred to. The importance and efficiency of these provisions, if events were to arise in which obstruction to the collection of revenue should be attempted or threatened, are too obvious to require comment. The several district attorneys of the United States will take especial care to inform themselves of these enactments of law, and be prepared to cause them to be enforced in the first and in every case which may arise, justly calling for their application.

Declarations merely theoretical, or resolutions only declaratory of opinions, from however high authority emanating, cannot properly be made the subject of legal or judicial proceedings. They may be very intemperate, they may be very exceptionable, they may be very unconstitutional ; but until something shall be actually done or attempted, hindering or obstructing the execution of the laws of the United States, or injuring those employed in their execution, the officers of the government will remain vigilant indeed, and prepared for events, but without any positive exercise of authority. It is most earnestly to be hoped that the returning good sense of the people in all the States, and an increase of harmony and brotherly good-will everywhere, may prevent the necessity of resorting to the exer-

cise of legal authority ; it is to be hoped that all good citizens will be much more inclined to reflect on the value of the Union and the benefits which it has conferred upon all, than to speculate upon impracticable means for its severance or dissolution. No State legislation, it is evident, is competent to declare such severance or dissolution — the people of no State have clothed their Legislature with any such authority ; any act therefore proclaiming such severance by a Legislature, would be merely null and void as altogether exceeding its constitutional powers. No State was brought into the Union by the Legislature thereof, and no State can be put out of the Union by the Legislature thereof. Doubtless it is to be admitted that revolution, forcible revolution, may produce dismemberment more or less extensive ; but there is no power on earth competent, by any peaceable or recognized manner of proceeding, to discharge the consciences of the citizens of the United States from the duty of supporting the Constitution. The government may be overthrown, or the Union broken into fragments by force of arms or force of numbers, but neither can be done by any prescribed form or peaceable existing authority.

History of Washington's Administration

THE following letter, relating to the History of Washington's Administration, which Mr. Webster had long contemplated writing, and the Notes which follow it, are printed from the original manuscripts, in the handwriting of G. J. Abbot, Mr. Webster's private Secretary, in the New Hampshire Historical Society. The letter and Notes were addressed to Edward Everett, by Mr. Abbot, April 12, 1854.

You may perhaps remember that I informed you, a short time after Mr. Webster's death, in reply to your inquiry as to the progress Mr. Webster had made in the "History of Washington's Administration," — that only the general plan of the work had been sketched.¹ This was prepared under the following circumstances.

¹ In a letter to Edward Everett, dated November 28, 1848, Mr. Webster wrote, "life is running off, while I make no progress towards accomplishing an object which has engaged my contemplations for many years, 'A History of the Constitution of the United States and President Washington's Administration.' This project has long had existence as an idea; and as an idea I fear it is likely to die. My remarks before the young merchants, were heads of what I have thought might fill a chapter or two." (Private Correspondence, Vol. II. pp. 289-290.)

The remarks referred to in this letter were made before the Mercantile Library Association of Boston, at Tremont Temple, November 15, 1848. No report of the address can be found in the Boston papers. The *Courier* said that "Mr. Webster's discourse embraced a view of the government of the United States as connected with the foreign relations and trade of the country. He gave a sketch of the history of the Federal Constitution, and enlarged upon the beneficent effects that had followed its adoption, particularly upon the social condition of the people. He drew a comparison between the political state of the monarchies of the old world and the free republic of North America, showing the superiority of our own liberal institutions, not only in securing the prosperity and

During the last year of Mr. Webster's life he not unfrequently spoke of the manner in which he proposed to employ his time after his retirement from office and public life.

The first time he mentioned this subject to me was at Marshfield in October 1851. He had just written the dedications of the several volumes of his works, & read such parts of the Memoir as you had then submitted to him. It appeared to strike him more forcibly than ever before, how long his life had been protracted; for, he remarked, he found that he had been personally engaged in the discussion of almost every great question which had, at any time, occupied public attention during the last half century, while his memory reached back to the period of the adoption of the Constitution itself.

He told me that his work on the Constitution had long occupied his mind, and was so well matured that he could dictate it as fast as I could take it down, and he even thought that he could prepare a volume in a month. He proposed that I should leave Washington with him, go down to Marshfield & render such assistance, as his amanuensis, in the preparation of this latter work, as I was able.

We were interrupted in the conversation, and it was not again resumed at Marshfield.

You are well acquainted with the reasons growing out of the state of public affairs which induced him to defer his resignation.

After his return to Washington he would occasionally revert to the subject, thus showing his interest in it, & that he still looked forward to its accomplishment as the crowning effort of his life. Especially was this the case during the time he was engaged in the preparation of his Historical Discourse.

At this time, also, he was making those arrangements in regard to his cemetery, of which he speaks in one of his letters to Mr. Fillmore. There was evidently a strong impression upon his mind, perhaps, I might say presentiment, that the remaining intellectual labor which he designed to accomplish must speedily be commenced and finished. The severity of his autumnal catarrh in 1851, & the serious tone in which he would sometimes speak of its recurrence in 1852, showed that it gave him much anxiety.

happiness of the people, but in fixing the principles of Government upon a steady and permanent basis." In another issue the *Courier* said that "Mr. Webster made some remarks on the distinction between a Congress as the name is applied in our own government, and the old diplomatic use of the word in Europe."

He remarked one day, when we were alone, that he should complete his seventieth year in the following January, & that he had been for some time thinking of resigning his seat in the cabinet, & he proposed to do it when he should reach that age; something he added respecting the seeming impropriety of holding a subordinate position after reaching that period of life, and of receiving instructions from a younger man. He said he should not enter again into active practice at the bar, as he more & more disliked the contests, often exciting and wrangling, in which he must sometimes engage with young men. He spoke of the more congenial pursuits with which he intended to occupy himself,—his little book—which he designed as a relaxation from his more serious studies—on the birds & fishes of Marshfield; of this he repeated to me a chapter on the cod-fish—an imaginary conversation between Seth Peterson and an intelligent boy. As you may readily perceive with Mr. Webster's interest in the subject, his acquaintance with it, his great fund of anecdotes, & the great simplicity & clearness with which it would have been treated, the work would have been one of the most popular & fascinating books of the day.

He subsequently referred to his proposed work on the evidences of Christianity. This was a favorite idea with him, & he often spoke of it in Washington, & when he left there in 1852, he directed me to bring the copies of Cicero de Natura, which he proposed to translate & illustrate with notes. And when near the termination of his life, finding that even this could not be accomplished in the very presence of death, he condensed into an epitaph the expression of his belief in Christianity in the place of an irresistible argument which he hoped to have made.¹

in which he was greatly interested. In the summer of 1852, I collected, at his suggestion, and sent to Marshfield, such public documents and books as would be useful for consultation & reference in the preparation of the Work.

While in the cars on our return from Trenton, where he had argued the great India rubber case, I called his attention to some proposed alterations & corrections of the proof sheets of the Historical Discourse which had been sent to him for his inspection. I noticed, afterwards, as he sat alone in his seat, that his mind was occupied, & I forebore to interrupt him. He soon called me to his

¹ A sheet of Mr. Abbot's letter which should follow, is missing.

side, and, — in that earnest & impressive manner, which he so frequently assumed in the last months of his life, and which made us feel that whatever he said, it was intended we should remember, — stated at considerable length the outlines of his proposed Work on the Constitution.

Some days, subsequently, in the little office in his house, at Washington, he dictated the heads of this conversation, or rather the general plan of the Work as it then lay in his mind.

He directed me carefully to place this memorandum among his private papers in my care.

He did not again revert to this paper.

After Mr. Webster's death, on my return to Washington, I looked for this paper but was unable to find it. Frequent & careful searches were made both in the Department and among my own papers.

I felt quite certain that I had taken it to Marshfield in September 1852, though I was confident it had not been called for by Mr. Webster. At last, I became satisfied that it had been left at Marshfield, & would be found among Mr. Webster's papers, or that, by some mischance, it had been destroyed: This I feared as the original was taken down so rapidly that it is almost illegible, & might easily have been mistaken for useless memoranda. Fortunately, I found last night, in a very safe place, the long missing paper, which I hasten to transcribe & place in your hands.

With great regard

Very truly Yours

G. J. ABBOT.

Mr. Webster thinks of writing a History of the Constitution and of the Administration of the First President, — the Work to be comprised in about fifty chapters of fifty pages each, to commence with the First Congress,

As showing the sense of the country upon the importance of a United Government.

Not to relate the military events of the War of the Revolution, but to record the proceedings which led to the adoption of the Articles of the Confederation.

To state things as they existed at the peace of 1783.

Their insufficiency to answer the purposes which a Union of the States was designed to accomplish.

The growing necessity in the minds of men, of a Government, which, instead of acting through the authority of the States, should act directly on individuals.

The state of the country at the conclusion of peace.

A geographical description of the settled parts of it.

The population of the respective States.

Their Agriculture, Commerce and Manufactures.

A good Map.

The continental debt then existing.

The debts of the several States.

The inability of Congress and the States to pay their debts.

Proceedings of Legislative and other public bodies in the States, showing the unsatisfactory state of things, and the necessity of a new form of Government.

The proceedings which led to the meeting of delegates at Annapolis.

The proceedings of the Congress of the Confederation, and especially the Reports of the Committees.

Mr. Hamilton, Madison and others.

The meeting of the Convention in Philadelphia in May 1787.

Full Biographical notices of its members.

Its proceedings and discussions.

The Constitution as the result of the deliberations of this Convention.

Its publication and the proceedings of Congress thereupon,

Its discussions before the people.

The Federalist.

The debates in the several State Conventions.

The general principles of the Constitution as a popular representative Government.

Montesquieu.

The difficulty of framing a provision for an Executive head.

The happy contrivance for the Constitution of the Senate.

The Constitution.

Its compactness, its brevity, and its comprehensiveness.

Its felicity in declaring what powers Congress should possess, and what powers the several States should cease to exercise.

An examination of the powers of Congress, with the reason

for each, and so of the Judiciary power and the Executive power.

The great idea that such a Government must have an ultimate construction and power of decision respecting the extent of its own authority.

The necessity that a legislative power should be accompanied with a commensurate Judicial and Executive authority.

The influence of commercial necessity as producing a disposition to adopt this constitution.

The Public Lands.

The National Debt, and the certainty that it could not be paid under the existing provisions.

The interest with which the World looked upon this great experiment of Republican liberty.

Dr. Paley.

The adoption of the Constitution by nine States.

The election of the first President.

The difficulty of assembling the first Congress.

The Inauguration of Genl. Washington at New York,

The early Laws,

The organization of his Cabinet.

Acts of Congress authorizing the appointment of Executive officers or Heads of Administration.

A general view of the country at that time, in regard to its domestic situation, its industry, trade, &c. and in regard to its foreign policy.

General Washington's first Inaugural speech.

These topics to form the first volume.

Volume Second

Gen. Washington's domestic policy.

The payment of the public debt.

The establishment of a commercial system.

The Revenue system.

The Currency,

The Bank,

The Mint,

The Naturalization laws,

The policy of the Government in regard to the industrial Arts.

The sale of public lands.

Copy right, and Patent Inventions,

The Census.

The Judiciary, (a most important chapter).

The men who formed the act,

Richard Henry Lee.

Simeon Strong &c.

The character of the men who composed the first Administration, and the leading members of Congress, of whom biographical notices shall not have been made under a previous head.

The establishment of a seat of Government in the District of Columbia, and the laying out of the City of Washington.

Rebellions in Pennsylvania, & other domestic occurrences.

Rapidly growing prosperity of the country under this new Government.

Popularity of the Administration at home, and the rapidly growing respect for the country abroad.

The beginning of settlements in the North West Territory &c, &c,

Volume third.

General Washington's second election.

The French Revolution,

Our connection with France, and the commencement of this revolution to be stated and discussed at large,

Washington's proclamation of neutrality,

Policy of this measure, and its Justice towards France, under the Treaty of alliance of 1778 to be fully considered.

The general principles of Washington's Administration in regard to our foreign relation,

Neutrality.

Non Intercourse.

The equality of Nations

The exactness with which Washington demanded all proper respect from all other Nations.

His Justice united with high bearing,

The British Treaty of 1794,
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Washington's dignified conduct and rebuke of the disturbers,
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Mr. Jay,
Lord Grenville,

The unconsciousness at that time of the probable growth of American Commerce, and especially of the production of Cotton in the United States.

The consequence of this production, and its influence upon Slavery in the United States,

The difficulties with France,

The state of the country at the close of Washington's Administration in March 1797.

Its resources, Commerce and manufactures,

The use of the Federal and Republican parties,

John Adams,

Thomas Jefferson,

The close of Washington's Administration, and his farewell address,

A comparison of the character of Washington with those of the most distinguished public men of Ancient and Modern times.

Legal Arguments Hitherto
Uncollected

With Notes by JOHN M. GOULD

Argument in the Case of Gilman v. Brown et al.

UNITED STATES CIRCUIT COURT, May Term, 1817.¹

IN this case, the questions were as to the nature and validity of the plaintiff's title to the shares claimed by her in the lands of the New England Mississippi Land Company, and whether she was equitably entitled to claim her proportion of the certificates of public stock received by the company from the U. S. government in consideration of its release of title to the lands it had aimed to acquire in the Mississippi Territory. The opinion of the court by Story, J., then an associate justice of the U. S. Supreme Court, was in favor of the plaintiff, and adverse to Mr. Webster's contention for the defendant. The case has been considered an instructive one, chiefly on the nature and origin of liens on land for unpaid purchase-money, and acts constituting a waiver of such liens. The above opinion was affirmed by the U. S. Supreme Court, to which the case was taken by the respondents' appeal, and where Mr. Webster's argument for the appellants in reply, covering less than four pages in Wheaton's reports, vol. 4, p. 255, 274, briefly recapitulates the points taken in this argument.

Mr. Webster for the defendant said:

The plaintiff comes into Court as the holder of an equitable interest only. The legal estate was vested by the conveyances in trustees, and William Wetmore, from whom the plaintiff's title is derived, was entitled to nothing but the benefit of the trust. The title, therefore, is no better in the plaintiff's hands, than it was in the hands of William Wetmore. The purchaser of an equity must abide by the

¹ This case is reported in 1 Mason, pp. 191-223.

case of the person from whom he buys. He must take the estate subject to all incumbrances. Want of notice, or payment of a valuable consideration, will not enable him to raise himself higher than his vendor. Lord Thurlow says,* he takes that to be a universal rule. †

Holding the title of Wetmore subject to all the equity which belonged to it in his hands, the question is, whether the plaintiff can claim any portion of this fund? A sufficient answer to this claim is, that she has contributed nothing to the fund. She wishes to partake in the benefit, without having partaken in the burden. She may indeed have paid a valuable consideration to Wetmore, or his assignee of whom she purchased; but that payment has not gone into this fund, and gives her no equity against these defendants. She is the representative of Wetmore's right, and as far as any thing was paid on that right, so far an allowance has already been made by the commissioners under the Act of Congress, to those whom they thought entitled to receive it. For what remains, she can be entitled to nothing, because, as to this, the right which she represents has paid nothing.

It has been urged, that the New England purchasers intended to incorporate their several titles and estates into one common estate, and out of this to carve new portions for the several purchasers, according to the amount of their original interest, but entirely disregarding the quality of their original titles. If this had been so, it would not help the plaintiff's case. Wetmore, as well as the others, had covenanted for title, and could not be permitted, in a Court of Equity, to claim against those covenants the benefit of a conveyance, which turns out to be inoperative and unproductive, as far as he was concerned in it, on account of his violation of the covenants of his deed. But there was no intention to consolidate their several titles by the purchasers. They had purchased in unequal portions a large tract of land. It had been conveyed to them by several and distinct conveyances. They did not expect to make partition, and occupy the land imme-

* Davis v. Austin, 1 Ves. jun. R. 247.

† See also Macreth v. Symmons, 15 Ves. jun. R. 329, and Sugden, 482, (2d Lond. edit.).

diately. Their object was to sell, and this object could be best attained, as they supposed, by acting together. They agreed, therefore, on common trustees to hold the legal estate, and on a committee, who should be the common agents, stewards, or attorneys of the parties. But in their deeds to the trustees they covenant severally, each one for himself, and expressly renounce all mutual responsibility.

They agreed to appoint the same trustees, and the same agents, but there is nothing from which it can be in the slightest degree inferred, that they intended to take the risks of each other's titles.

It was not necessary to say, whether the commissioners were well supported in the decision which they had made. No fraud or negligence is at any rate imputed to the defendants. They have used due diligence, and sought to increase the fund, by obtaining from the commissioners the stock which would have belonged to the original purchase of Wetmore, if his title had been deemed valid. In this they have failed without any fault of their own. The commissioners have decreed, that that portion of Wetmore's purchase which was conveyed to Williams, through whom the plaintiff derives her title, is not entitled to any indemnification. They proceed on the ground, that the original Georgia vendors had a lien for the purchase-money, and that they, if any body, the purchase-money not being paid, are entitled to the indemnity provided by the Act of Congress. That the vendor has in equity a lien for the purchase-money against the vendee, and all purchasers under him with notice, if it be a legal estate; and against all persons purchasing with or without notice, if it be an equitable estate; could not be denied as a general doctrine. The English cases, on this point, are all considered by Lord Eldon in *Macreth v. Symmons*.

There may be a relinquishment of this lien; and the evidence of such relinquishment may result from the nature of the transaction and the circumstances attending it. How far such evidence existed here, it was the duty of the commissioners to consider. If they have erred in judgment, the consequences of that error ought not to be thrown on the defendants. The stock, which the commissioners were to

issue, may be considered as the proceeds or product of the estate vested in the trustees. The bill does not complain that the defendants have injured the plaintiff by surrendering the estate to the United States. In this they are admitted to have done precisely what they ought to have done. The complaint is that a just distribution has not been made of the proceeds. But the plaintiff's estate has produced no proceeds. The commissioners were empowered by the Act to judge between adverse claims. They have decided against the claim of the plaintiff; and it would be manifestly unjust and unreasonable, that, having a bad claim herself, she should partake with others in the benefit of their claims, which are good, unless she clearly proves an agreement to form this sort of partnership. And indeed if it were proved, that Wetmore and others agreed to form this partnership, each at the same time covenanting for the title of what he himself brought to the common stock, he could not claim in equity a proportionate share of the proceeds of the whole, having broken his own covenant, and the general proceeds being thereby diminished in an amount equal to what he undertook to convey to the trustees. If the plaintiff could recover in this case against the defendants, one of whom is the surviving trustee, that trustee must have his action against Wetmore on the covenants of his deed of trust. But such a proceeding would be novel. It is not the course in equity to treat covenants as distinct and independent, but to require of plaintiffs to allege and prove performance, or readiness to perform on their part.* If the land, or its proceeds, have been taken from the trustee by some one, whose title has been adjudged better than that of the *cestui que trust*, is it possible, that the *cestui que trust* can have any claim on the trustee?

The plaintiff relies on the articles of association, which say that the certificate shall be complete evidence of the title. So it may be; but it does not say what title the holder of the certificate shall be taken to have. The articles mean no more than that the certificate should be evidence of the transfer. Whatever the vendor could sell, he might assign by endorsing the certificate. But in this there is no agreement to assure

* Fonblanque, 383.

the title. The certificate itself refers to the articles of association and the deeds of trust, to show the nature and condition of the property. These articles and deeds prove clearly, that the original purchasers stand on their several distinct purchases, and decline all mutual responsibility. She must therefore be taken to have known, what she purchased, as the reference in the certificate to the deeds and articles was sufficient to put her on inquiry.

Where one has sufficient information to lead him to the knowledge of the fact, he shall be deemed conusant of it.* Even if her estate had been a legal and not an equitable interest, still this constructive notice would have prevented her from standing in any better condition than those under whom she held.

It may be added, that this whole subject was within the jurisdiction of the commissioners. They were not bound to award an aggregate sum to the defendants, to be by them divided for the benefit of the associates. In point of fact they did award in some instances to individuals, who made application for themselves, not through the agency of the defendants. In regard to the sums, which the defendants have received, the commissioners have decreed that the plaintiff is entitled to no portion. Whatever their original rights were, all parties have agreed to surrender them to the United States, and to receive indemnification to the amount, and in the manner, provided by the Act of Congress. Under that Act nothing has been allowed the plaintiff. The defendants, as her agents, have received nothing, and therefore can be chargeable with nothing.

* Sugden, 498, and cases there cited.

Argument in the Case of Harvey v. Richards

UNITED STATES CIRCUIT COURT, FIRST CIRCUIT, May Term, 1818.¹

IN this case, Mr. Webster's argument for the plaintiff was in reply to the argument of Prescott and Hubbard for the respondents, in opposition to Mr. Aylwin's opening argument for the plaintiff. The opinion of Mr. Justice Story was in favor of the plaintiff, the issue being whether a court of equity could or would decree an account and distribution, according to the law of the domicil, of the estate of a decedent domiciled abroad, which has been collected under an administration granted here.

This argument proceeds on the ground, that no debts or legacies remain unsatisfied in India; and that the executor there has no beneficial interest under the will. The case is presumed to be such, that if the plaintiff were before the proper Court in Bengal, with this bill, such Court would be bound to decree distribution.

It is no answer to the plaintiff, that her bill calls on the Court to apply the laws of another country. Courts apply those laws in many cases. The Sessions did this in *Bruce v. Bruce*. The Master of the Rolls did the same in *Kilpatrick v. Kilpatrick*. The Court of Pennsylvania applied the law of Delaware in *Guier v. O'Daniel*.^{*} So far there can be no difficulty or doubt in the case.

A decree for the plaintiff must be resisted, if it can be resisted at all, on the ground, that there being an existing administration, *in loco domicilii*, the effects collected else-

¹ This case is reported in 1 Mason, pp. 381-430.

^{*} 1 Binney R. 349.

where, must, in all cases, be remitted to the hands of the administrator or executor there, to be by him distributed. This is contended for as a universal rule; subject, however, to one exception, which is, that creditors here have a right to be paid here, out of the funds.

Is there any such universal and inflexible rule? The plaintiff contends there is not. The law on this subject may be considered as of modern origin. It arises from comity, and from the regard, which Courts of one country pay to the private rights of the citizens or subjects of another country. But a rule, in the extent contended for, is not required by any of the reasons, in which the general doctrine or general practice is founded. The property is to be remitted, when any purpose of substantial justice requires it. But if the rightful owner be here, why should it be sent abroad for no reason, but to send him after it? The case under discussion supposes the plaintiff entitled to this property, and that if sent to India, and she were to follow it thither, it could not be refused to her. If the fund were wanted in India for any purpose of the will; or if any person there had rights in it, or claims upon it, the case would be different. But as the fund is here, and as the plaintiff, a citizen of this country, is entitled to it; and as this Court is competent to distribute it, comity cannot require from this Court the compliment of deferring the cause to the jurisdiction of the Court in India. This is not required by that regard to the rights of individuals, subjects of other countries, which has governed the decisions of Courts in these cases. And, that regard to these rights, is the foundation, upon which Courts proceed in such cases, is proved perhaps by the circumstance, that no case is mentioned, probably none exists, in which the government of one country claims property in another, as escheating to itself. The Courts of this country would remit this property to England or to India, to answer the claims of legatees or next of kin there. But they would not remit it for the benefit of the British Exchequer, if there were no legatees or next of kin.

If, then, the question be not a technical one about the jurisdiction of the Court, but of justice and private right,

should it not appear, that some purpose of right or justice is to be answered by remitting the property to India?

If there is no known and fixed principle, requiring the rule to be carried to the extent mentioned, the Court will look to the consequences of adopting it in that extent. Many cases of inconveniences have been stated on the other side, which might happen, if the Court should distribute personal property, found here, and belonging to one dying abroad. And no doubt there are cases, in which convenience, as well as justice would require the fund to be remitted. But the question is, whether this must be done, and in all cases? Or, on the other hand, whether the Court may not do that, in each case, which the justice of that case shall require?

A man might die in India, domiciled there, leaving the bulk of his property, and all his creditors, next of kin, and legatees, here. There may be nothing to be done in India, but collect debts due to the estate. Those may be here, who are entitled to the whole. Shall it all, nevertheless, be sent to India? If not, then there is no such universal rule as has been supposed.

There are many cases, in which decisions have been made inconsistent with the existence of any such rule. One is, where persons dying abroad leave executors, both abroad and in England. The executor in England is bound to distribute what comes to his hands. He is not merely to collect the effects, and remit them to the executor acting *in loco domicilii*. *Brooks v. Oliver*,* appears to be a case of this sort. So is *Chetham v. Lord Audley*.†

Another case is, where the will is proved in both countries.‡ *Cooper* says, "The Municipal Courts of this country will also, by a principle of the law of nations, in the case of strangers leaving property here, distribute that property, in the case of death, by the laws of their own country, provided such stranger is not domiciled here."§ He makes no exception for the case of there being another administrator or executor *in loco domicilii*. All these cases and opinions seem to be wrong, if the law be, as stated in one of the cases relied on

* *Ambler*, R. 406.

† 4 *Ves. jun. R.* 72.

‡ *Nesbitt v. Murray*, 5 *Ves. jun. R.* 149.

§ *Cooper's Eq. Pleading*, 121.

by the other side,* viz. that all effects and choses in action, wherever collected, must be accounted for and finally administered in the country, where the deceased had his domicil. The rule is not laid down to that extent, in any other case, or by any writer. The administration *in loco domicilii* may be, and in cases arising in the East and West Indies, very often is, considered as a mere agency. In *Chetham v. Lord Audley*, Lord Loughborough says, "I think the appointment of an executor in India, no legacy being given to him, is the appointment of an agent for the management of the estate. They give them the character of executors." In such a case, the creditors and legatees, or next of kin being in another country, the India administration should, from the nature of the case, be considered as auxiliary to the uses of the property and the interest of those concerned. It should be accessory to that administration, which exists, where those are, who have a right to the property.

In *Jauncy v. Sealy*,† there seems to be no objection to calling the administrator *loci domicilii* to account to the administrator in England, provided there had been effects in England. *Tourton v. Flower* is to the same point. These cases are incompatible with the existence of a rule, which renders the administration *in loco domicilii* in all cases the leading one, and treats the other as entirely subordinate. Indeed, there will hardly be found to be any such rule, as that where there are two administrations on one estate, existing in different independent countries, one must be considered in all cases as principal, and the other as merely auxiliary and subordinate. Strictly speaking, no such relation can exist between authorities derived from different sources. Each administration is independent of the other; the power of administering issues from different and independent origins. Courts of law and equity will compel administrators, who act in an official capacity, so to act as to answer the ends of justice; and for this purpose they will, if necessary, hold an administrator in one country to be trustee of an executor or administrator in another country. But then a case must be made out, in which justice and equity require this. There may be administra-

* *Dawes v. Boylston*.

† 1 *Vernon R.* 377.

tions with equal claims to be considered single and independent. Suppose a man domiciled in England, to make his will there, leaving property both there and here. He may give a legacy to a person here, charged on the property here, and a legacy to a person in England, charged on the property there; and he may appoint executors in both countries. Should the legatee here be referred in such case to England for payment? Or suppose that there were, in such case, only the English executor, and he should come here, prove the will, and obtain the property by the aid of the laws of this country, could he not then be compelled to pay the legacy here? If we go one step further and suppose, that instead of coming with the will, he should send it, and it should be proved, and administration granted, at his request, to some one, with the will annexed, and then suppose further, that instead of a legatee applying for a legacy, the next of kin apply here for a surplus, we have the present case. A will might be made abroad, which could be only executed here. It might charge annuities or the maintenance of infants or relatives on the funds in this country, and be made payable on contingencies, which could be known and ascertained nowhere else. It might direct property to be invested in stock here, for the purposes of the will. A testator in England, having property here, might bequeath it to charitable purposes here. Such a trust must be enforced here or nowhere; because the English Court of Chancery has declined to enforce the execution of a charity in favor of objects existing under a foreign government.*

A principal case relied on by the counsel for the defendant is *Pipon v. Pipon*. As to that case, it may be remarked 1st. That the plaintiff there had clearly no right. 2dly. That the plaintiff did not ask for distribution according to the laws of Jersey. Lord Hardwicke seemed to think something remained to be done in Jersey. Nothing can be proved by that case, except that the succession is to be governed by the law of the domicile.

It has been said, that from an expression of the Master of the Rolls in *Somerville v. Lord Somerville*, it may be inferred, that he would remit the funds for distribution to the Court of

* *Attorney-General v. City of London*, 3 Brown Ch. Cases, 171.

the domicil, instead of distributing them himself. "The country," he says, "in which the property is, would not let it go out of that, until it knew by what rule it is to be distributed." But this expression cannot warrant the inference drawn from it. And in the very cases in which it was used, the Master of the Rolls appears to have decreed distribution according to the laws of Scotland.

In *Dawes v. Boylston* it is said, that creditors here are to be paid before the fund is to be remitted. This is stated without qualification, and without reference to the case of other creditors existing abroad. This exception opens a door to all the inconveniences, which have been stated, and to great injustice in many cases; because the greater part of the property might be here, while the greater amount of debts might be abroad, and the whole estate insufficient to pay all. And it is not easy to see why the next of kin, there being no debts, have not as well founded a right to the property, as creditors, where there are debts. So also of legatees. It is not matter of favor, in Courts of Equity, to compel the payment of legacies, or to decree distribution; nor have they any broader discretion in such cases than in the payment of debts.

It is difficult to perceive the reason, why debts are to be paid, and legacies not paid, or the surplus not distributed. By the law of England assets are to be marshalled, and judgments and bond debts are to be paid before debts by simple contract. If a simple contract creditor be found here, his debts having been contracted in India, and with reference to the laws of that country, may he obtain satisfaction out of the funds here, and leave judgment creditors and bond creditors unpaid in India? It would seem at least to be equitable, that debts contracted in India should be paid according to the laws of India, wherever the fund might be found. A general rule, that all debts asserted here, wherever contracted, should in all cases be paid out of the funds here, would seem to be as objectionable, as the supposed rule, that legatees and next of kin must, in all cases, resort to the forum of the domicil. It is possible, that the Judges in *Dawes v. Boylston* might have felt themselves restrained by the nature of the jurisdiction, which they were exercising. They might not consider

themselves as possessed of all the power of a Court of Equity. If there were no inconvenience of that sort, and if the merits of the case had required it, I am not able to see why a decree might not have been made in that case in favor of the inhabitants of Boston. A conclusive reason in favor of such decree would seem to be, that if the will of the testator could not be enforced in that particular, by the Court here, it could not be enforced at all, and the testator's object would be wholly defeated.

In the subsequent case of *Stevenson v. Gaylord*, the same Court appear not to have considered any rule established in *Dawes v. Boylston*. The Court in that case says, "If it should appear upon due examination in our Probate Court, that Tilbalds had his home in Connecticut, we should cause the balance, remaining in the hands of the administrator here, to be distributed according to the laws of Connecticut, or transmitted for distribution by the administrator in Connecticut, under the decree of the Court there." This language is not consistent with the supposition, that the Court had either found or made a rule requiring a transmission of the fund in all cases. I consider, therefore, that the decisions in the Supreme Court of this State, taken together, have established no such rule as the defendant contends for.

If no settled rule has been shown, by which the plaintiff must be referred to India for distribution, there is no principle of equity opposed to granting her relief here. The defendant professes to be trustee for the executors in India, and the case is such that if the executors in India shall receive the money, they will be trustees for the plaintiff. Then why may not the plaintiff treat the defendant as her trustee, and claim the money directly from him. There is no question about sufficient parties. The executors in India have had notice of this suit, and the defendant represents them in it. A decree here will protect him against them. He has collected this fund through the assistance of the judicial tribunals of this country; and if he shall now distribute under their decree, he cannot be made further answerable to anybody.

Argument in the Case of M'Culloch v. the State of Maryland

UNITED STATES SUPREME COURT, February Term, 1819.¹

THIS case, finally deciding, in 1819, the question whether Congress had the implied power which it had attempted to exercise as early as 1791, to create and incorporate a bank, contains one of the best-known and most important of Chief Justice Marshall's opinions, supporting Mr. Webster's contention in favor of the existence of such power in Congress. The government of the United States having directed their Attorney General to appear for the plaintiff in error, the Court dispensed with its general rule, permitting only two counsel to argue for each party. The validity of the national bank act of 1864 is founded upon the views of the Constitution which became settled principles by this decision, as was held in 1875 in *Farmers' and Mechanics' National Bank v. Dearing*, 91 U. S. 29.

The case has been repeatedly relied upon as the leading guide upon all questions of the relations of the States to the general government, and the powers granted by the former to the latter, down to and including the great debate in *The Income Tax Cases*, 157 U. S. 429, 158 U. S. 601. In 1832, when the Bank of the United States, which, established in 1816, had grown to be a financial power, applied for a continuance of its charter, Mr. Webster had occasion to defend the doctrines laid down by the court in this decision, which he did with great ability, showing not only remarkable knowledge and grasp of the principles of the Constitution, but also of the intricacies of public finance. See *Lodge's Life of Webster*, p. 203.

Mr. Webster, for the plaintiff in error, stated.

1. That the question whether Congress constitutionally possesses the power to incorporate a bank, might be raised upon

¹ This case is reported in 4 Wheaton, pp. 316-437.

this record; and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped that it was not now to be considered as an open question. It is a question of the utmost magnitude, deeply interesting to the government itself, as well as to individuals. The mere discussion of such a question may most essentially affect the value of a vast amount of private property. We are bound to suppose that the defendant in error is well aware of these consequences, and would not have intimated an intention to agitate such a question, but with a real design to make it a topic of serious discussion, and with a view of demanding upon it the solemn judgment of this Court. This question arose early after the adoption of the constitution, and was discussed, and settled, as far as legislative decision could settle it, in the first Congress. The arguments drawn from the constitution in favor of this power, were stated, and exhausted, in that discussion. They were exhibited, with characteristic perspicuity and force, by the first Secretary of the Treasury, in his report to the President of the United States. The first Congress created and incorporated a bank.* Nearly each succeeding Congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government. Individuals, it is true, have doubted, or thought otherwise; but it cannot be shown that either branch of the legislature has, at any time, expressed an opinion against the existence of the power. The executive government has acted upon it; and the courts of law have acted upon it. Many of those who doubted or denied the existence of the power, when first attempted to be exercised, have yielded to the first decision, and acquiesced in it, as a settled question. When all branches of the government have thus been acting on the existence of this power nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. Congress, by the constitution, is invested with certain powers; and, as to the objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the constitution,

* Act of February 5th, 1791, c. 84.

empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So it has power to raise a revenue, and to apply it in the support of the government, and defence of the country. It may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war, or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of Congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words, "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed. If this be not so, and if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the States. It is not for this Court to decide whether a bank, or such a bank as this, be the best pos-

sible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them in the two houses of Congress. Here, the only question is, whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government, as to be fairly within the discretion of Congress, when selecting means and instruments to execute its powers and perform its duties. A bank is not less the proper subject for the choice of Congress, nor the less constitutional, because it requires to be executed by granting a charter of incorporation. It is not, of itself, unconstitutional in Congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; and, as means, take their character generally from their end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. The State governments create corporations to execute powers confided to their trust, without any specific authority in the State constitutions for that purpose. There is the same reason that Congress should exercise its discretion as to the means by which it must execute the powers conferred upon it. Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed. Among other means, it has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown, that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.

2. The second question is, whether, if the bank be constitutionally created, the State governments have power to tax it? The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the State Governments, and certain other powers on the National Government. As it was

easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the *supreme law of the land*, and shall control all State legislation and State constitutions, which may be incompatible therewith; and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, any thing in the laws of any State to the contrary notwithstanding. The only inquiry, therefore, in this case is, whether the law of the State of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it? If it be not, then it is void; if it be, then it may be valid. Upon the supposition that the bank is constitutionally created, this is the only question; and this question seems answered as soon as it is stated. If the States may tax the bank, to what extent shall they tax it, and where shall they stop? An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the States may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the State governments for its existence. This consequence is inevitable. The object in laying this tax, may have been revenue to the State. In the next case, the object may be to expel the bank from the State; but how is this object to be ascertained, or who is to judge of the motives of legislative acts? The government of the United States has itself a great pecuniary interest in this corporation. Can the States tax this property? Under the Confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that "no imposi-

tions, duties, or restrictions, should be laid by any State on the property of the United States." Is it supposed that property of the United States is now subject to the power of the State governments, in a greater degree than under the Confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and must have, property locally existing in all the States; and may the States impose on this property, whether real or personal, such taxes as they please? Can they tax proceedings in the Federal Courts? If so, they can expel those judicatures from the States. As Maryland has undertaken to impose a stamp tax on the notes of this bank, what hinders her from imposing a stamp tax also on permits, clearances, registers, and all other documents connected with imposts and navigation? If by one she can suspend the operations of the bank, by the other she can equally well shut up the custom house. The law of Maryland, in question, makes a requisition. The sum called for is not assessed on property, nor deducted from profits or income. It is a direct imposition on the power, privilege, or franchise of the corporation. The act purports, also, to restrain the circulation of the paper of the bank to bills of certain descriptions. It narrows and abridges the powers of the bank in a manner which, it would seem, even Congress could not do. This law of Maryland cannot be sustained but upon principles and reasoning which would subject every important measure of the national government to the revision and control of the State legislatures. By the charter, the bank is authorized to issue bills of any denomination above five dollars. The act of Maryland purports to restrain and limit their powers in this respect. The charter, as well as the laws of the United States, makes it the duty of all collectors and receivers to receive the notes of the bank in payment of all debts due the government. The act of Maryland makes it penal, both on the person paying and the person receiving such bills, until stamped by the authority of Maryland. This is a direct interference with the revenue. The legislature of Maryland might, with as much propriety, tax treasury notes. This is either an attempt to expel the bank from the State; or it is an attempt to raise a revenue for State purposes, by

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an imposition on property and franchises holden under the national government, and created by that government for purposes connected with its own administration. In either view there cannot be a clearer case of interference. The bank cannot exist, nor can any bank established by Congress exist, if this right to tax it exists in the State governments. One or the other must be surrendered; and a surrender on the part of the government of the United States would be a giving up of those fundamental and essential powers without which the government cannot be maintained. A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government, that Congress should be able to exercise its constitutional powers, at its own discretion, without being subject to the control of State legislation. The question is not whether a bank be necessary, or useful, but whether Congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the State governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of Congress establishing the bank be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of State legislation. To hold otherwise, would be to declare, that Congress can only exercise its constitutional powers subject to the controlling discretion, and under the sufferance, of the State governments.

Argument in the Case of *King v. Dedham Bank*

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK AND
NANTUCKET, March, 1819.¹

THE decision in this case affirmed the constitutional principle contended for in Mr. Webster's argument for the defendants, that "no act of the legislature can alter the nature and legal effect of an existing contract, to the prejudice of either party; nor give to such a contract a judicial construction, which shall be binding on the parties, or on the courts of law." It will be noted that this argument is based in part upon that principle, which was a cardinal one in Webster's legal career, that "the Constitution of the United States is the paramount law of the land; and every attempt to counteract its provisions, made by what body soever, is utterly void." At the proceedings in the Supreme Judicial court of Massachusetts in Bristol county, on the death of Mr. Webster, Chief Justice Shaw, who had been junior counsel associated with Mr. Webster, in both the State and Federal courts in the important case of *The Charles River Bridge v. The Warren Bridge*, said: "He was ardently devoted to the support of the Constitution in its integrity, because he regarded it, under Providence, as the only safeguard and guaranty of the Union; and he loved the Union, because, in his sober judgment, its preservation is essentially necessary to the peace, liberty, and security, and consequently, to the best and truest interests of the whole community." Webster's Memorial, p. 131.

Mr. Webster, for the defendants, contended:

1. That the evidence did not maintain the declaration, independent of the statute of 1816, c. 91. The declaration is

¹ This case is reported in 15 Massachusetts, pp. 446-454.



on direct and absolute promises. The papers offered in evidence are but proof of conditional promises implied by the law, after presentment of the bills, a refusal on the part of the drawee to pay them, and notice to the drawers.

If it was unlawful for the defendants to issue these papers, this could give no new rights to the plaintiff under the contracts; although, perhaps, the defendants may be liable to the process of the commonwealth, by a *quo warranto*. But it was in no view unlawful for the defendants to draw their funds from the places where they were deposited; even if all their notes ought to have been payable at their own bank, which were intended for circulation. It was for the public to discriminate between bank notes payable on demand, and these bills, so very distinct in their nature and properties.

2. Nor is the action better maintained by the evidence, in virtue of the statute relied on. So far as the provisions of this act are prospective, the defendants make no objection. But as it is intended to be retrospective in its operation, it is, to say the least of it, bold legislation. As proposed to act on a contract already made, it is void; and indeed, as it is prospective, it is not perceived that the legislature are more authorized to make such a provision applicable to stockholders in a bank than to any other class of citizens, as merchants, physicians, agriculturists, or mechanics.

In the case of *Brown v. The Penobscot Bank*,* it was yielded by the counsel and the Court, that, had the statute on which that suit was brought, which was like this in its penalties, been retrospective in its effect, it could not have been enforced.

The act now under consideration would make a contract, which the parties had agreed should be performed at Middletown, to be performed at Dedham. It is an attempt to operate on a vested right, to adjudicate on an existing fact.†

The constitution of the United States is the paramount law of the land; and every attempt to counteract its provisions, made by what body soever, is utterly void. The act in question is rather an edict, or decree, than a law, which always has reference to the future.

* 8 Mass. Rep. 445.

† 2 Vent. 227. — 1 Mod. 310.

The case of *Dash v. Van Kleck* * was not so strong a case as the present. It was not interfering with existing contracts, but merely regulating the measure of damages in certain cases of tort; yet a majority of the court refused to give it a retrospective operation, and the judges who dissented agreed in the general principle.

* 7 Johns. 477.

Argument in the Case of Foster et al. v. Essex Bank

SUPREME JUDICIAL COURT OF MASSACHUSETTS, AT BOSTON,
MARCH TERM, 1820.

IN this case the court first sustained the points taken in Mr. Webster's closing argument in support of Mr. Pickering, who was associated with him for the plaintiffs, to the effect that a State legislature may, by general law, as a matter affecting remedies and not contracts, extend the existence of all corporations which would expire at a certain time, beyond the time limited by their charters, for the purpose of suing and being sued, settling and closing their affairs, and dividing their capital stock, not including the continuance of the business for which they were established.¹ The case was then tried upon the general issue at the April term, at Ipswich, 1820, and, a special verdict having been returned, Pickering and Webster presented a joint argument for the plaintiffs which did not prevail. This case, which has become a leading one in the law of bailments, and which is reported in 17 Mass. 479, 9 Am. Dec. 168, decided that a mere gratuitous depositary, without any special undertaking, — in this case, a bank of which the defendants were the proprietors, and which had received a special deposit of gold which was afterwards fraudulently taken out by its cashier, — is not liable for the loss of goods which it has used due care in keeping, though the loss is caused by the theft of its servant or agent. Both these decisions have uniformly been accepted as undoubted law. See *e. g.* *United States v. Prescott*, 3 How. (U. S.), 578, 588; *Simmons v. Hanover*, 23 Pick. (Mass.), 188, 194; *Howe v. Newmarch*, 12 Allen (Mass.), 49, 54.

Mr. Webster, for the plaintiff, said:

To determine whether this act impairs any rights of the parties, it is necessary to ascertain what those rights were

¹ Mr. Webster's argument is in 16 Mass. pp. 266-269.

independently of the act in question. The plaintiffs must be taken to be creditors of the corporation. They have a claim with all *primâ facie* evidence in its favor; and are therefore creditors as far as they can be before judgment. As creditors they have a right to payment out of the funds of the corporation. If the corporation should dissolve, leaving their demand unsatisfied, there can be no doubt that they would still have a right in equity, to follow the fund, and charge their debt upon it in the hands of those who should have possession of it.

The plaintiffs thus having a right to be paid out of the corporate property, and the persons who have obtained possession of this property having no right to withhold it from them, what right is violated by this law? It was obviously intended to enforce rights, not to violate them. It gives a remedy, new indeed, but reasonable and practicable, for a manifest existing right. It neither increases the debt, nor varies the contract between the parties. It merely holds the corporation answerable for its obligations, until it fulfils them; and gives a new remedy to enforce their fulfilment. It is intended to enable the plaintiffs, and others in similar circumstances, to recover their money. Have they not a right to it? It is intended to compel those who hold the funds to pay the debts. Ought they not to be thus compelled? It is therefore a law giving a new remedy for an existing right; against which there can be no objection.

The statute is general, and governs other cases as well as the plaintiffs'. If it were a private act, applicable to a particular case only it might be thought a more questionable exercise of legislative power; because the true notion of law is, that it is a general and permanent rule of conduct. It has been the practice of the legislature of this commonwealth, for many years, to create corporations for a great variety of purposes, for limited periods. Many of these corporations are about expiring; and the single question, as far as the present case is concerned, is, whether the legislature may not, before they expire, provide a mode, in which their concerns may be settled (equally for the benefit of themselves and others), by the collection and payment of their debts.

There could be no objection to a provision by law, for the

appointment of an administrator, *eo nomine*, of the effects of an expired corporation; or for making the president, or the president and directors last in office, trustees to collect and pay debts, for the benefit of all concerned. Instead of either of these modes, the legislature has enacted that the corporate existence shall continue, so far only as shall be necessary to accomplish these purposes. It has in effect declared, that there shall still be a president and directors, with powers only to administer the remaining funds, and to collect and pay the debts, which were of the corporation.

It is not easy to conceive what contract this violates. The government has never stipulated that this corporation should have, at any time, an exemption from its debts. There is no contract, in its charter or elsewhere, that if it expires leaving debts unpaid, the funds shall not be followed for the benefit of creditors, in any mode or form of remedy which the law may prescribe.

All the cases cited by the counsel for the defendants are such, in which some vested right has been affected, or some new contract made, or attempted to be made, between the parties. The general principle of those cases is, most unquestionably, a sound one, and of great importance to be observed. But a distinction must be made between acts which affect existing rights, or impose new obligations, — and acts which give new remedies for existing rights, and enforce the performance of previous obligations.

This statute is as strictly remedial, as the late statute giving further relief in equity;* and yet no one doubts the propriety of applying the provisions of that statute, as a remedy to enforce the performance of contracts previously made. Perhaps it might have afforded a remedy in this case; but it would be liable to all the objections which have been urged against the present act; the whole amount of which objections is no more, than that a new remedy is given by law to enforce existing contracts.

This statute is not retrospective in any just sense of that term. A retrospective law has been defined to be a law which takes away or impairs vested rights. But if it be the

* Stat. 1817, c. 87.

object and operation of this law to confirm and enforce rights, and to provide adequate and suitable remedies for the violation of them, it cannot be within the definition.

The cases, which have been cited for the defendants, are not like this. In the Dartmouth College case, the legislature of New Hampshire, by a special act, undertook to abolish, in effect, a private corporation, and to give its property to others. The corporators were deprived of their own property, without forfeiture, without trial, without even the imputation of a fault. *Fletcher v. Peck* was a case, in which the legislature of a state undertook to resume its own grant, and that after third persons had obtained an interest in the land granted. In the case of *King v. Dedham Bank*, this Court held that an act of the legislature could not have the effect of altering a private contract, subsisting and unbroken between the parties at the passage of the law, by varying the terms, or imposing new duties on either party, in regard to the sum to be paid, or the place or time of payment. Or in other words, it could not enact that the parties had made a contract, which they never had made. The present case is like none of these. It is but a general provision, giving new remedies prospectively, for cases in which corporations might expire by the limitation of their charters, leaving their affairs unsettled.

It is of no importance, whether the inducement of the legislature to pass the law grew out of an expected difficulty in regard to this particular corporation or not. Inconvenience, felt or apprehended, is the ordinary occasion of legislation. The statute is general, and its provisions seem to be beneficial to all parties, and to be within the proper exercise of legislative power.

Opinion on the Validity of a Vermont Statute

DECEMBER, 1821.¹

OTHER phases of this litigation, which was important and celebrated in its day, appear in *Hathaway v. Allen*, 1 Aiken's Reports (Vt.), p. 13, and in *Brayton's Reports* (Vt.), p. 152. In 1878, in the case of *Ashuelot R. R. Co., v. Elliot*, 58 New Hampshire Reports, p. 451, Chief Justice Doe, in delivering the opinion of the court, quotes the entire paragraph of this opinion of Mr. Webster, beginning "The standing laws of Vermont," as undoubted law.

I have considered, in this case, simply the question;—is the act of the Assembly of Vermont, granting a new trial, conformable to the constitution of that State?

By the constitution of Vermont, one department is prohibited from exercising the powers which properly belong to another department. The question then comes to this, whether the power exercised in this case, be a legislative, or judicial power;—and I confess, it seems to me, that the question is answered, in the very stating of it. The object of the law is, to set aside a verdict; vacate a judgment; and grant a new trial. To what department, do these terms, "verdict," "judgment," and "trial," naturally refer us? Do they form a part of the language of Courts of law, or of legislation? There are two points of view, in which this act may be contemplated;—

1. As it grants a new trial;—
2. As it grants a new trial after judgment.

¹ From a pamphlet in the Boston Public Library, entitled "Opinion of the Hon. Daniel Webster upon the validity of the act of 1821, granting a new trial in the action, *Herman Allen vs. Silas Hathaway and Uzal Pierson.*"

The granting of a new trial, after verdict and before judgment, is a part of the ordinary administration, in all common law courts. The trial by jury, could not be maintained without it. The law decides in what cases it shall be granted, and in what cases refused, with as much certainty, as it regulates other exercises of judicial authority. It is to be granted, or refused, as matter of right. This power is not so properly incidental to the administration of justice, in a common law court, as an essential part of such administration.

If the legislature may grant a new trial, where the court have refused it, it may for the same reason, refuse or prohibit it, where the court has allowed it. If it may interfere at all, in such cases, it may interfere as well to control the power of the court when exercised one way, as when exercised another. Suppose, in this case, the Court had been of opinion, that illegal evidence had been admitted, and had, on that account, awarded a new trial? Could the Legislature, on the application of Mr. Allen, have passed an act, abrogating that decision, and directing the Clerk to enter up judgment on the verdict, and issue execution? It is certain, that their power to do this is as clear, as their right to control the judgment of the Court, granting a new trial.

This being a case of granting a new trial after judgment, it is much stronger, against any supposed authority in the Legislature to interfere with it; as by the judgment, the plaintiff obtained a perfect vested right, of which, he cannot be dispossessed or divested, any more than of his freehold, but by process and judgment of law. The Legislature have no more power to vacate that judgment, for the purpose of granting a new trial, than for any other purpose, or for no purpose, beyond the mere annulling it. By the judgment, the plaintiff had become a creditor, of the defendants. The judgment was his debt. To vacate that judgment, was to discharge that debt, and remit him to his original cause of action. They might, with the same propriety, discharge the debt, without remitting him to his original cause of action, if they had seen fit so to do. If they could vacate his judgment, on condition, they have power also to vacate it without condition. They might enact its satisfaction, or its release; they might enact

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that lands levied on, under it, should not be holden ; or that the debtor imprisoned under it, should be discharged. In short, they might make any other decision or disposition of the cause, with the same propriety, as they interfere with this judgment.

The standing laws of Vermont, proceeding on the principle that vested rights are not to be divested, but by legal process and judicial proceeding, have authorized the Supreme Court of Vermont to grant new trials, for good cause shown, after judgment. In this very case, it was competent, and is now competent, for the Supreme Court to award a new trial. Now, this must be the exercise, either of a judicial or a legislative power. It cannot be both. If it is a power, which may be constitutionally exercised by the legislature, for that reason, it cannot be exercised by a judicial tribunal. Either therefore, the general law of Vermont is unconstitutional, or this act is so.

In short, this is a case, in which no lawyer can reason. It appears to me too plain for argument. The Legislatures of Massachusetts and New Hampshire have formerly interfered, in such cases ; but, on examination it has been found, that such interferences were altogether unwarrantable ; and no lawyer, of reputation, in either of those States, I apprehend, now supposes their Legislatures to possess any such power. Yet there is, in the constitution of either of these States, no more positive prohibition than in that of Vermont. Out of New England, I am inclined to think, these legislative interpositions in private law suits, have occurred rarely, if at all. I have had occasion to state this case to a gentleman of the first eminence, in the middle States, in whom it excited great surprise.

On the whole, my opinion is, that the act in question, is a plain and manifest violation of the Constitution of Vermont.

DANIEL WEBSTER.

Argument in the Case of La Jeune Eugénie

UNITED STATES CIRCUIT COURT, FIRST CIRCUIT, May Term, 1822.¹

THIS was a libel against a schooner for being engaged in the slave trade ; such trade having been prohibited by act of Congress after June 1, 1808, which was the time limited by the Constitution beyond which slaves could not be imported here. The joint argument of Mr. Blake and Mr. Webster on behalf of the United States and the captors, was successful in establishing, among other points, that a right of seizure may exist on the high seas apart from any right of search, and that, in the abstract, the African slave trade is inconsistent with the law of nations. The learned opinion of Judge Story, then an associate justice of the Supreme Court, concludes by announcing that, a suggestion having been filed by the District Attorney, by direction of the President, expressing a willingness to surrender the vessel to France, the wishes of the government would be acceded to by the court, which accordingly directed the property to be delivered to the consular agent of the King of France, to be dealt with according to his own sense of duty and right. In the case of *The Antelope* (10 Wheaton, 66), the Supreme Court afterwards held that the slave trade, having been generally sanctioned by modern nations, could not be considered piracy apart from statutes or treaties, or as prohibited by universal law.

Yet Mr. Webster's broad claim that the slave trade is piracy has been practically adopted by the civilized world. As such, it was made punishable by death by Congress in 1820, and by Act of Parliament in 1824.²

¹ The case is reported in 2 Mason, pp. 409-463.

² The following letter, relating to this case, was written to Mr. Webster by Commodore R. F. Stockton, Nov. 5, 1821, and is printed from the original in the New Hampshire Historical Society :

"I was much obliged & relieved by your kind communication respecting the *young Eugénie* — The report here was that she was acquitted, and

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Messrs. Blake and Webster, on behalf of the United States and of the captors, contended :

1st. That the *Eugénie* was a vessel of the United States. It appeared from the register, that she was built in the United States, and no evidence being offered to show that she had been transferred to French citizens before the passage of the law of the 20th of April, 1818, it was not to be presumed that she was so transferred until after that time; that the assumption of the French flag, and of French papers, for the purpose of evading the laws of the United States, had now become so common that the courts of the United States would not rest satisfied with such evidence, alone, of French ownership; that the act of the 20th of April, 1818, which threw the burden of proof on the defendant to show that he had not broken the laws of the United States, applied as well to this case as to that of the importation of slaves into the United States. And it therefore became necessary for the Claimants to show a *bona fide* transfer of the *Eugénie* to French subjects, which could only be done by producing the bill of sale.

we had no explanation giving the true state of the affair — you have made the most of the case, and if you can maintain the great point you have taken, you will have done more for the cause of humanity than all the Societies in the U. S. put together — If the Flag of nations who have prohibited the Trade shall yet cover it so as that it can't be questioned by another, for our selves we had better keep our business at home — It is perfectly known at what rate Americans can be turned into Frenchmen or Spaniards in the West Indies — I am well informed that a French and Spanish Merchant are now going thro' the U. S. making proposals to our wealthy Merchants to embark their Capital in that traffic — They made their appearance lately at the Coffee house in Phi^a — had a scheme prepared shewing the safety of the project, and that the profits would be immense — they had come on from Baltimore, and the understanding was that they had been very successful. I hope that you will be able to get Robert out of this scrape, at least without costs and damages — and I trust that he will have too much wit to run any more such risques. He ought to know that as long as the General Gov^t is under absolute Southern influence there can be no *bona fide* wish to put an end to the Slave trade — and consequently that an officer would have no great chance of indemnification in case of damages being awarded against him — I shall rejoice to hear that you maintain the great point even in the Circuit Court. I should think its fate at Washington would be doubtful, especially if it be true as Judge Story in one of the papers is made to say that the Court is called on to establish a new principle of public Law."

2d. That it fully appeared from the evidence in the case, that this vessel was actually engaged in the slave trade.

3d. That if the court should be of opinion, that the vessel was *bona fide* French property, still, as it necessarily appeared to the court from the investigation of the case, that she was engaged in the slave trade, the court would take notice of the French ordinances against that traffic, and the ship being rightfully in the possession of the court, it would refuse to deliver it up to the claimants, who were precluded from asserting property therein, as well by the law of their own country, as by that of this country.

4th. It was contended, that the slave trade was contrary to the law of nations, as at present understood and received; and that this court might rightfully condemn the *Eugénie* for an infraction of that law. It was urged, that the slave trade was contrary to the law of nations, because it was a violation of the law of nature, which constituted a component part of the law of nations. It was not denied, that slavery might under some circumstances have a legal existence: and therefore a trade in slaves might be under these circumstances legal. But that this traffic preyed upon the innocent and the free to make them slaves, for no crime or offence. That it was merely a barbarous, unauthorized, private, piratical warfare, carried on against Africans to make them slaves.

That it was contrary to the law of nature, because it instigated and encouraged the most atrocious crimes and barbarities, and presented an insurmountable barrier to the advancement of civilization and virtue in that country, which was its theatre.

It was further contended, that most or all of the civilized nations of the globe, had declared their sense of the illegality of this trade, by enacting laws to suppress it, and by various other public acts, treaties, and declarations. And that it might now therefore be considered as contrary to the conventional law of nations. And to support this ground the various laws and ordinances of different governments on this subject were adverted to, and commented on, as also the various treaties between nations, and their public declarations and diplomatic correspondence.

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It was finally contended, that this point had been already judicially decided; and the cases of the *Fortuna*, 1 Dodson, 81; the *Amédie*, 1 Dodson, 84, note; the *Donna Marie*, 1 Dodson, 91; the *Diana*, 1 Dodson, 95; and the case of the *Plattsburg*, decided by Judge Van Ness in the district of New York, were here cited.

The counsel confined their argument solely to the claim of Messrs. Raibaud and Labatut; and admitted, that a different question might arise in the case, if any claim should be presented in the name, or on behalf of the French Government.

Argument in the Case of the Marianna Flora

UNITED STATES SUPREME COURT, February Term, 1826.¹

IN this case, which was originally one of prize for piracy, the Vice-Consul of Portugal and the owners, as claimants, had become actors, seeking damages in their turn for the alleged unjustifiable seizure of a Portuguese vessel, by an armed vessel of the United States, and sending her in for adjudication. A decree of the District Court awarding damages for such sending in and for the detention having been reversed in the Circuit Court on appeal, such reversal was, at the February Term, 1826, affirmed by the Supreme Court which decided in favor of the points suggested in this argument of Mr. Webster which followed that of Mr. Blake, both being for the captors. The opinion, in deciding interesting questions upon the law of prize, treats the fact of combat, which took place between the vessels, as resulting from mutual misapprehension and mistake; the Portuguese vessel and her valuable cargo having already, by the request of the government of the United States, and with the libellants' consent, been restored to claimants, and further proceedings respecting them having been abandoned.²

Mr. Webster, for the respondents, entered into a minute examination of the evidence, in order to show that the party, who was in fact the wrong doer, and the aggressor, now appeared before the Court in the character of a plaintiff, seeking redress for a supposed injury done to himself. It had been said, that the owners of the ship, and of the cargo, were not to be held responsible for the misconduct of the master.

¹ Reported in 11 Wheaton, pp. 1-58.

² For an interesting account of this case, see *Figures of the Past*, by Josiah Quincy, pp. 242-253.

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There were two answers to this objection; (1.) That it was not the captors who were seeking to punish the owners, but the owners who were seeking compensation against the captors for the consequences of the misconduct of their own agent. (2.) That the universal principle, applied by Courts administering the law of nations, was to consider the thing taken *in delicto*, as responsible, whether it was the property of the master, or of others. In cases of blockade, of contraband, of carrying enemy's property with false papers, of resistance to visitation and search, he is considered as the agent of the owner both of ship and cargo. So, also, the revenue laws, from the necessity of the case, regard him in that character, and subject the vessel and goods under his control to confiscation for his unlawful acts. In every case, until the innocent are separated from the guilty, until examination and regular adjudication can be had, the law is compelled to regard the ship, and every thing on board, as belonging to the master.

It had also been contended, that though the original seizure might be justifiable, the captors were liable in costs and damages for not releasing the vessel after she was subdued and seized. But it was not pretended that Captain Stockton had authority to punish her himself; and, therefore, unless the Portuguese ship had, notwithstanding all that had happened, a clear right to go off with impunity, he had an unquestionable right to send her in for adjudication. If she had a right to pursue her voyage, she would have had the same right if the consequences of her aggression had been ever so calamitous; if she had crippled the Alligator, and destroyed half her crew. The actual consequences being less serious, do not affect the right, though they may the exercise of discretion. But we have nothing to do here with the question of military discretion. The captured vessel had made war. She had committed what was, *primâ facie*, a piratical restraint and depredation. If unexplained, it was piracy. Whether it could be satisfactorily explained, or excused, was a question to be decided by the civil tribunals. It was not too much to say, that the captors had here something of a belligerent right. The act of Congress was not a mere munic-

ipal law; it was a prize ordinance. The seizure was not a mere municipal seizure. War against pirates existed, and the act was intended to define who should be treated as pirates. And, even if the Court should now be of opinion, that the captured vessel ought not, under all the circumstances, to be sent in, still the question recurs, whether Captain Stockton might not, at that time, have thought otherwise. He was called on, suddenly, to decide and act on a question full of difficulties, and which has occasioned no little embarrassment to the civil tribunals, with all the advantages of a deliberate examination. Even with these advantages, the learned Judges of the Courts below have differed in their judgments upon it; and yet, it is now contended, that this naval commander was bound to be better instructed in the laws than those whose peculiar duty it is to study and expound them. Upon these grounds it was, that Sir W. Scott determined, in the case of the *Louis*,* that it being a case *primæ impressionis*, the captors were exempt from costs and damages, although the Court was clearly of opinion, that the seizure itself was unjustifiable, a right of search not existing in time of peace. A doubt respecting the true construction of the law, is as reasonable a ground for seizure, as a doubt respecting the fact.† But, here was doubt respecting both fact and law, and that doubt is not yet cleared up. The capture was made in repelling what appeared, at the time, to be an act of piratical aggression. It has turned out not to be so, after a judicial examination. But, the question is, what it appeared to be *recenti facto*. It cannot be maintained, that an habitual course of piratical depredation is necessary to constitute the offence of piracy. A single act of piratical aggression, stimulated by revenge, or national prejudice, or wanton cruelty, would be sufficient. The act of Congress evidently supposes it, and is in conformity with the public law.

It had also been argued, that this was a municipal seizure, and that the vessel having been restored without a certificate of probable cause, costs and damages followed as a matter of course. But, it was insisted, that municipal seizures are for

* 2 Dobs. Rep. 210, 264.

† 5 Cranch's Rep. 311.

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offences within our own territorial jurisdiction, or by our own citizens elsewhere. Here, the proceedings are under the law of nations; and, if found guilty, the property would be condemned, not for a municipal offence, but as prize, and distributed as prize. And, even if it had been a municipal seizure, it could not be admitted that such consequences would necessarily follow in every case, without regard to its circumstances. The true principle applicable to seizures of every kind was, that the party having a right to cruise, and bring in some vessels, if others so conduct as to give themselves the character of those who are liable to capture, they would be entitled to nothing but simple restitution. This is laid down in clear and satisfactory terms by Sir W. Scott: "The natural rule is, that if the party has been unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule; but, like all other general rules, it must be subject to modifications. If, for instance, any circumstances appear, which show that the suffering party has himself furnished occasion for the capture; if he has, by his own conduct, in some degree contributed to the loss; then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution." *

* The *Acteon*, 2 Dods. Rep. 48.

Obstructions to Navigation

An Opinion as to a Proposed Bridge

MARCH 20, 1826.¹

WASHINGTON, Mar : 20, 1826.

GENTLEMEN,—I have been favored with yours of the 14th instant, relative to the proposed new Bridge, & another also from Mr. Welles, accompanied by a Report, made to the Senate, by a Com^{ee} of which Mr. Hoar is Chairman.

In a question, at once so important, & so difficult, I feel extremely unwilling to say more than the emergent occasion requires. Whether the State Legislature can authorize an *obstruction*, in an arm of the Sea, on which a Port of delivery is established, by the laws of the United States ; and, if it cannot, whether a Bridge, built for public convenience, & having suitable draws for the passage of vessels is to be deemed an unlawful obstruction, are questions depending on very general considerations, & are of great moment. Very little has been decided, or discussed on such questions, except what transpired in the New York Steamboat cause, with which you are probably acquainted. On the other hand, the rest of the Bridges about Boston, & especially Craigie's, seem to stand only on the supposition that the Legislature may exercise such a power. There is a Bridge, also, over Piscataqua River, at Portsmouth, fifteen or twenty miles below the head of the tide. There are other similar cases.

It is difficult to draw a line between Rivers, below the head of the tide, & arms of the Sea. If the commerce of the United States, for its substantial interest, & convenience, require a port of delivery at Roxbury ; & if a Bridge, with suitable

¹ From the draft, in Mr. Webster's handwriting, in the New Hampshire Historical Society.

Draws, ought to be considered as a real & substantial obstruction, in the way of such Commerce, then it would seem to follow that such Bridge could not be lawfully erected. But I do not feel prepared, at present, to express an opinion on either of those questions. I might mislead you, by doing so ; & they are, indeed, questions of a nature as fit to be considered by yourselves, as by me. The Courts of U. S. could not regard the injury to private property.

I am the more willing to be spared from giving an opinion on those points at present, because I do not see how the question can be raised, till the Bridge shall be built, or begun. The Courts of the U. S. cannot interfere, till some one, lawfully navigating, meets with an unlawful obstruction. He can then sue, & try the right. There must be some actual conflict, between a right exercised under the State, before a ground of action can be laid.

In this view of the case, it is perhaps not expedient that I should do more than to indicate the general nature of the questions, which would come, in my opinion, to be discussed, should the occasion be furnished.

Opinion

MARCH 23, 1827.¹

THE provisions of the Charter which have, or may be supposed to have more or less bearing on this question, are the 7th & 12th Sections, & the 7th fundamental Rule.

By the 7th Sec. the Corporation is made capable of purchasing, having, enjoying, & retaining lands tenements and hereditaments, to an amount not exceeding 55 millions of Dollars, including the Capital.

But this power to purchase & hold lands, which would thus be general, (within the limited amount) were there no further provision in the Charter, is qualified, or restrained by the 7th fundamental Rule, which confines the exercise of the power to the holding of such lands, & tenements only as shall be requisite for the immediate accommodation of the Bank, in relation to the convenient transaction of its business, *and such as shall have been, bona fide, mortgaged to it, by way of security, or conveyed to it, in satisfaction of debts previously contracted, in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts.*

In the case now under consideration, the lands are stated to be such as fall within the latter claim of the section, and the question is, *whether the Bank may improve the lands and tene-*

¹ From a manuscript, in Mr. Webster's handwriting, in the Library of the University of Pennsylvania. It was probably addressed to Mr. Nicholas Biddle to whom Mr. Webster wrote several letters in the years 1826 and 1827 on matters connected with the United States Bank to which this opinion also relates. The subscribers to the Bank of the United States were incorporated, with a capital of \$35,000,000, by the Act of Congress of April 10, 1816, ch. 44 (3 U. S. Stats. at Large, p. 266), of which Act §§ 7, 12 are here discussed by Mr. Webster. The history of that bank is given in the Life of Mr. Webster by George Ticknor Curtis, Vol. I. p. 150.

ments, which have thus fallen into its possession, by repairing & enlarging the buildings, or by constructing new buildings, on the premises.

I see nothing in this section, to prevent its doing so. The sec. imposes no limitations on the *use* of the property. It looks only to the *origin & cause* of the title, or conveyance, under which the corporation holds.

It was not intended to allow the Bank to become a great landed proprietor ; but it was foreseen, first, that it must own Banking Houses ; and, second, that in a country where land is almost universally subject to be taken for debts, it must, like other creditors, occasionally take bonds, for that purpose, as well as receive it, for security, by way of mortgage. The Bank is, therefore, authorised to hold lands & tenements, the title to which is, *bona fide*, derived in either of these ways ; & being thus authorised to *hold*, it is wholly unrestrained, in the *manner* of holding, & in the use & improvement of the property.

It may erect new fixtures, or destroy old ones ; construct houses, or demolish houses already constructed. Keeping always within the general limit, as to amount of property (55 millions) & possessing no lands not *bona fide* coming to its possession as security, or in payment, it has as free & full a discretion, in the use of what it does thus hold, as an individual proprietor would have.

The 12th Sect. restrains the Corporation from trading in buying *or* (probably means *and*) selling, goods wares and merchandize. The Bank is not permitted to become a *trader*. But the purchase of building materials, no more makes it a trader, or brings it within the prohibition of this sect. than similar purchases by an individual, would make him a trader, within the Statutes of Bankruptcy.

On the whole I entertain no doubt, that the Bank may improve this property by enlarging and repairing existing buildings, or constructing new ones as its own sense of interest and convenience may prescribe.

DAN! WEBSTER.

Argument in the Case of Carver v. Jackson

UNITED STATES SUPREME COURT, January Term, 1830.¹

THIS was a writ of error in the circuit court of the southern district of New York in a case where the plaintiff in error was the original defendant; the action being ejectment brought upon several demises,—among others, upon the demise of John Jacob Astor. A verdict was rendered, and judgment was entered for the original plaintiff. Both parties claimed under Mary Philipse, who, in January, 1758, was seized of the premises in fee, and, being then unmarried, executed the deed of marriage settlement, in which her future husband, Roger Morris, and certain trustees therein named joined; under which the plaintiff in ejectment claimed, and which recited a lost lease, which is the lease referred to in heading No. 1 of Webster's argument in this case. The claim of the defendant to the same premises was under a sale thereof, as the property of Roger Morris and his wife, made by certain commissioners acting under a statute of New York, passed Oct. 22, 1779, and declaring their property confiscated for adherence to the enemies of the United States. Some of the counts set up in the declaration were founded upon demises made by the children of Mary Philipse, by her marriage with Roger Morris, and one of them was upon the demise of John Jacob Astor, who claimed as a grantee of the children. Various exceptions were taken by the original defendants to the court's ruling at the trial upon matters of evidence, and upon certain points of real property law growing out of the above titles set up by the parties. The case was argued at great length at the January Term, 1830, by Mr. Bronson, the attorney general of New York and Mr. Webster for the plaintiff in error, and by Mr. Ogden and Mr. Wirt for the defendant in error. The decision was in favor of the latter, the

¹ The case is reported in 4 Peters, pp. 1-101.

above judgment of the circuit court being affirmed. This case, which involved a discussion of abstruse problems of contingent estates and shifting uses, serves, like the argument next following (in *Wilcox v. Plummer*) to illustrate Mr. Webster's greatness, strength, and lucidity, even as a technical lawyer, in cases between private parties and involving private rights. Among the other points here decided, it was held that leases, like other grants and deeds, may be presumed from long possession which cannot be otherwise explained; that a party is not necessarily bound by natural justice to pay for improvements on land to which he has not assented; and that, upon both principle and authority, the recital of one deed of title in another binds, as an estoppel, the parties, and also their privies, whether in blood, in estate, or in law.

Mr. Webster, for the plaintiff in error, said:

The first inquiry in the case was, as to the manner in which the verdict was obtained. Was it regularly proved that any conveyance was ever completed, by which Mary Morris parted with her fee in the land, and which was existing as a valid conveyance in October 1779? We say it was not: because, we say, the judge misdirected the jury on the evidence bearing upon that point.

We say a judge may commit errors which this court may correct; either, 1. In admitting evidence which ought not to have been admitted. 2. In rejecting what ought to have been admitted. 3. By misstating the effect, not the weight of evidence. 4. By misleading the jury by a wrong statement to them of what the evidence really is.

The two first propositions no one will deny. *Tayloe v. Riggs*, 1 Peters, 183, 596. *Chirac v. Reinecker*, 2 Peters, 625. *Dunlap v. Patterson*, 5 Cowen, 243.

The weight of evidence is for the jury. If a judge happens to say that he thinks A. more credible than B. it is a remark on evidence. If he says that it strikes him as not proved that a bond was given, it is the same; not so, if he speaks of the tendency or effect of evidence. If he says; this evidence, if believed, tends to establish the party's right when it does not; or that it does not when it does; then it is error; because, it is a remark not on evidence, but on the law of evidence. So

if he misstates the thing to be proved, or the object for which it is intended, or its legal bearing; this is error.

With these general principles in view, we mean to examine the judge's ruling on the trial in the circuit court.

1. As to the evidence of the question of the lease. Nothing was proved but by the testimony of Governor Livingston and Mr. Hoffman. This was all merely formal. Governor Livingston's oath was in the very words of the attestation, and no more; it was written for him beforehand, and in the formal words of attesting an instrument. He was an old man, swearing to a transaction then thirty years old; and there was no proof, no circumstance of which he had any recollection, but from seeing his signature. There was no more in this than in all other certificates of attestation; they usually certify delivery before any actual delivery is made, and this was the fact in one of the conveyances by Mr. Astor in this case.

The deed was doubtless executed at the house of Mrs. Philipse. All this is no more than proving his own hand writing in 1787; and this would have answered the same purpose. All that was proved in this case was merely formal; it is just what would have been done if the parties had intended only to have a deed prepared, to be delivered or not, as they should afterwards decide, as an escrow. It is certain he did not see any actual delivery of the deed; and, while nothing is imputed to Governor Livingston, his testimony goes no further than has been stated.

There was no other proof of the existence of this paper, until it was proved in April, 1787. It is not traced to the hands of the grantees. No one ever saw it; it was not shown to the legislature. Perhaps, on this evidence, and its effects, the judge did not misdirect the jury.

This, though perhaps *primâ facie* proof, was the slightest of all proof. No actual delivery shown, no possession of the deed by the grantees. Now suppose a marriage had not taken place, and the trustees had set up this deed; it would have been said at once that the presumption of delivery was overruled. Any thing else that carries an equal presumption destroys the *primâ facie* proof. It is, of all cases, the one in

which subsequent events might intercept the delivery of the deed.

We were not called upon to disprove delivery; it was enough for us to bring the fact of delivery into doubt; every thing else without delivery was nothing. The judge in this matter was right.

Now what did we offer against this evidence. 1. The deed was never recorded or proved: this was not required by law, but it was usual, especially with this family; all their deeds were recorded; the first patent, the deed to lead to uses, the deed of partition; and the will was proved in chancery.

The settlement deed of all others was a proper deed to be recorded; it was to provide for unborn children, and the practice of the family was not to be changed. The trustees would, in accordance with their duty, prove and record this deed, to preserve the rights of the children.

More especially, why was not this deed proved and recorded in 1783. Forfeitures were then all over; the children were born, and perhaps of men's estate. Only one part was found, and that had been carried beyond seas. Would prudent men have so acted. The treaty had then established the children's rights.

Now we say that this part of the case was not accurately stated to the jury. The judge asks if these circumstances should operate against the children? We say they should; and we think here is a plain misdirection in point of law.

We say that all the evidence relied upon by us, drawn from the conduct of the immediate parties to the supposed deed, is evidence against the children. The judge says these facts should not operate against the children; we contend that they should and must; and this is a direct question of law, not a mere remark on evidence.

Again, the judge excuses Morris from recording the deed, because he says there were at that time no offices for recording deeds. But this could only be from 1775 to 1783. Our argument is, that if the deed had ever been delivered, it would have been recorded before 1775. Is the form of this argument fairly stated? Is it legally stated? Then again, as to not recording in 1783; the judge asks, are there not

circumstances to account for this delay of three or four years? This is equivalent to saying that there are such circumstances.

2. The sleeping of this settlement from 1758 to 1787, twenty-nine years, is relied upon to prove that it never had a legal existence. No witness ever saw it. It was not heard of by any of the family. It is recited in none of the conveyances. These are material facts. In the history of this title each deed recites the previous deed, down to that now under examination; below it they recite not through it, but over it; or as if it were not in existence. There is an absolute absence of every possible fact looking to or recognizing the existence of this deed for thirty years.

Now is not this of itself evidence of weight and importance to rebut the presumption of delivery?

How does the judge answer this? He says there would have been weight in this if the children had slept thus long; we say it is just as strong against them, for the purpose for which we use it, as against Morris and wife, and the trustees. "The children slept upon their rights:" the very question is whether the children had any rights. It is not whether they shall be barred, but whether they ever had any estate. Now this is clear matter of law. "Is it fair to draw any inference in such a case against the children?" That is, the jury understood the judge to say; the law will warrant no such inference. We say it will.

3. The manner of holding the property, and acts inconsistent with the title under the deed, disprove its existence.

Here is a whole series of acts extending over many years, by the very persons who were parties to the supposed settlement, and absolutely irreconcilable to the idea of its real subsistence. These were the conveyances executed by Roger Morris and wife, in which the settlement was not mentioned, and conveyances made in direct disaffirmance of it. The charge of the judge upon these matters was altogether erroneous.

The deeds thus executed, and the agreements, indicate a holding of the property in fee simple, not a holding under the settlement. And the judge says; that they are within the

limitation of the power reserved in the settlement deed, and not inconsistent with it.

Is this so? By the settlement deed, Morris and wife had estates for life only: in the deeds they expressly covenant they are seized in fee. Now the consistency or inconsistency of these deeds is a question of law, though the effect of the inconsistency is a question for the jury. The judge has said that in point of law they are consistent deeds, that there is no inconsistency between the covenants in the deed and the title under the settlement. Is this correct?

If the judge had said that this form of executing the powers, might have been used through mistake; that the deeds might have been inartificially drawn; and that the jury might consider those circumstances; it had been well enough. But he withdraws the whole matter at once from the consideration of the jury, by directing them, as matter of law, that there is no inconsistency. Can this be sustained?

As to the life leases, they were not given under the power reserved in the settlement deed, nor in execution of the power. They are totally inconsistent with it, and the evidence shows a system of leasing the lands. How does the judge dispose of these? It was a question of intention as we say; and the judge asks, how do these facts affect the rights of the children? This is equivalent to saying they do not affect the rights of the children at all, in point of law. This is a legal direction on the effect of evidence. Is it right? Might not these acts affect the children?

Again, the judge says, did Morris intend these acts in hostility to the children? That is not the true question. The question is, whether these acts go to show that there were no rights in the children. The truth is, the judge proceeded altogether on the supposition that there had been an original acknowledged right in the children, and that we were attempting to bar that right by adverse possession. We say these acts prove or tend to prove that there was no subsisting settlement, and that not only the weight but the bearing and effect of this evidence was misstated to the jury.

We contend that every thing from 1758 to the revolution, bearing either way, bears against the settlement deed, as a

subsisting deed, and for the original title; every thing giving indications either way, indicates a holding under the original title. That in thirty years there was no act to the contrary. We do not say these circumstances are conclusive as matters of law, but we say they are cogent as matters of evidence; and we say the judge substantially withdrew the consideration of them from the jury.

On the other important fact that the deed came, in 1787, from the hands of the grantor, the judge said nothing. He omitted to notice the circumstance, although he stated that he had mentioned all the circumstances of the case.

Then the case is: 1. That the deed, thirty years after its date, is still found in the hands of the grantor, not proved, acknowledged or recorded. 2. That no other part of the indenture is produced, lease or release, though search has been made for it. 3. That no one ever saw the deed from its date until 1787. 4. That no one act was done in thirty years, recognizing the existence of the deed for thirty years. 5. That subsequent conveyances, deducing the whole title, and reciting every other conveyance in the chain, make no mention of any such settlement deed. 6. That there is a series of acts, deeds, conveyances and compacts, beginning within five days of the date of the supposed settlement, and coming down to the revolution by parties to the supposed deed, wholly inconsistent with any idea of its subsistence.

Now we admit that a jury may set up the settlement deed against all this evidence; provided no direction be given them after the evidence is put in, and provided no improper direction be given. We do not ask the court to decide on the weight of evidence. But we say, if the judge misstates the object of the evidence offered, if he misdirects as to its tendency and effects, if he states incorrectly the views in which it is evidence; then the jury has been prevented from passing intelligently on the matter. We say the directions of the judge on these facts were not according to the law of the case.

It is also contended that the acts of the legislature of New York were not evidence in the cause. The effect of their introduction was to change the parties before the jury. They were not general laws of the land; and they were important

testimony. For the admission of such evidence a court will reverse a judgment. 3 Cow. 621. 16 Johns. 89. 5 Cow. 243.

As to the recital of the lease in the deed of release; how far does it bind the plaintiff in error, and the state of New York, under which he claims?

It is admitted that recitals estop the party to the deed, himself and his heirs; because the heir is bound by the covenants of his ancestor. They also affect every person claiming under the instrument, unless it was offered as presumptive evidence of a grant in order to support a possession which could not be accounted for but on the supposition of such grant. These principles are fully sustained by the elementary writers, and by the cases in 1 Salk. 285, 286. *Ford v. Grey*, 6 Mod. 44. 4 Binney, 355. *Norris's Peake*, 164. *Archbold's Pleading*, 380. *Saunders on Pleading and Proof*. *Preston on Estates*, 43. *Phil. Ev.* 410. 1 Salk. 276.

There is no case in which a recital has been held to bind a person who comes in, *in invitum*. The alienee may be protected by covenants. But suppose a creditor who has the land in execution; he takes it bound by every thing his debtor has done, not by every thing his debtor has said. It operates by way of admission. Under what circumstances is one man bound by the admissions of another. Suppose an admission under hand and seal, that the property is held fraudulently. This will not bind the alienee without notice.

In the case in 1 Salk. 285, *Ford v. Grey*, what is meant by "those claiming under him"? Is it the persons who claim under the same conveyance, or merely by subsequent deed? The court had just decided that admissions in an answer in chancery bind the party, but not his alienee. If the court designed these words in their extended sense, they would have suggested the distinction between an answer and a deed.

The state of New York is a stranger to the deed of Morris and wife, and the recital should not, upon sound principles of law, have been admitted to prove the existence of the lease. But the circuit court admitted the recital to prove the existence of the lease, and also its contents. Upon the cases decided in Pennsylvania, in 4 Binney, 614, and another, the

possession was equivocal, and secondary evidence was called in aid. Those decisions turned on the special circumstances of the case. The case in 17 Ves. 134, was a case in which the lease was to be proved. Counsel were employed to examine the papers before the conveyance. The chancellor admitted the release, because the possession could not be accounted for on any other ground. If possession is equivocal, the exigency under which this case would apply has not arisen.

In Buller's *Nisi Prius*, 254, it is said, "when possession has gone along with the deed many years, the original of which is lost or destroyed, a copy or abstract may be given in evidence." In *Matthews* the doctrine is fully set forth, 188, 189, 190. And in the authorities cited, it is distinctly stated that the recital of a lease in the release is evidence in those cases where auxiliary proof is admitted to make out the presumption of a conveyance to support a possession. Now if the possession is equivocal, *ex natura rerum*, the presumption can never arise. *Ricard v. Williams*, 7 Wheat. 59.

In the case before the court the possession, so far as the acts of the parties to the alleged settlement deed are to give it a character, has been shown to be adverse to the terms and purposes of that deed, and not at any time such as could have existed had the deed been considered operative and in force. When therefore the parties did not by their acts give to the deed any influence, ought it to operate on those who were entirely strangers to it, and who rely on the acts and proceedings of the parties to the deed to prove it had not a valid existence. This is to give it effect and power over the rights of strangers, when these were never permitted by the parties to prevail as to themselves.

Upon the title acquired by the children of Roger Morris, under the deed of settlement, Mr. Webster argued:

The question upon this title is now for the first time to be discussed. The construction which this court will give to that deed may be in favor of Mr. Astor, and carry the rule as to contingent remainders to the extent claimed by his counsel; but there has been no case referred to which sustains the doctrine.

In all the definitions and general doctrines of remainders, the counsel for both parties agree. A remainder is "a remnant of an estate, expectant on a particular estate, created together with it, at one time." A contingent remainder is a "remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding estate."

These contingent remainders are classified under four divisions;—and the fourth class is, where the contingency consists in the person not being ascertained, or not in being, at the time the limitation was made.

The remainder now in question is of this class. Unquestionably when created it was contingent, because it was uncertain who would take. The example put by Fearné illustrates our case, as is contended. "If an estate be limited to two for life, remainder to the survivors in fee; the remainder is contingent, for it is uncertain who will be the survivor." Fearné on Rem. 9. And this case cannot range with the principles claimed for the defendant in error.

Now it being clear that this remainder being, at the time of its creation, contingent, because the persons to take were not ascertained; the question is, did it vest on the birth of a child of Roger Morris and wife, or remain contingent until the determination of the particular estate? We maintain the latter proposition.

Our view of the question is this. The deed created an estate for life in Morris and wife, with a remainder (not remainders), with an alternative aspect; or, in other words, to be disposed of, or go in one or other of the two ways, according to the events. We think the case precisely the same as if the words had been "an estate to Morris and wife for life, and to the children of the marriage in fee, if the parents should die leaving children; otherwise to the right heirs of Mary Morris."

It has been argued, that the object in giving a fee to the children was a high and leading one—that this was the first purpose, and all others were secondary. But the deed will bear no such construction.

It must be observed that the estate to be secured was the estate of Mary Morris. The object of the settlement was not to divest it, but to keep it in her control, and in the line of descent of her own right heirs. In only two events is it to be divested from her own right heirs. 1. If she have children living, it is to go to them, who, though her heirs, would take as purchasers. 2. The right to dispose of the estate by will in case of her dying without issue, and give away the estate to whom she pleased.

If she neither left children nor made a will, the estate would go to her own right heirs. In no event was it to be divested from her right heirs to the heirs of Morris, unless she should desire to have it so; and thus the true object of the settlement was no more than to point out two events, in either of which the transmission of the estate to her right heirs should be intercepted. To use popular language, the estate is not vested in the children by the deed; it is to be settled on them, if there should be children surviving the parents.

The estate is to move from the line of legal transmission, before it can be vested in the children as purchasers, and the removal is to take place on the happening of the contingency; this contingency we say is nothing other than the living of the children at their parents' death, or their surviving their mother.

Suppose the grant had been from a stranger to Morris and wife for life; and after their death to their children if living; or otherwise, to the right heirs of the wife. Would not this have been a clear case of survivorship? It is stronger in this case, where Mary Philipse is the grantor, and proposes not to dispossess herself, nor her own right heirs; except in the happening of certain conditions and contingencies.

Now we say that there is no intent or purpose manifested by this deed, which is not capable of being carried into full effect according to its nature and import as a regular remainder. It comes, as has been said, within the regular definition of a remainder; and of a contingent remainder of the fourth class. Cited, *Preston on Estates*, 119, 92, 93, 71, to show that it is a contingent remainder in Mr Fearn's fourth class.

It is not pretended that the limitation could not take effect as a remainder.

For the rule of law is universal and unbending. "If a limitation can take effect as a remainder, it shall not be construed to take effect under the doctrine of shifting uses." 2 Cruise, 350. The doctrine of shifting cases is analogous to that of executory devises. "If there be a freehold to support the remainder, it shall not be construed an executory devise." Doe v. Holmes, 3 Wilson, 243. Luddington v. Kime, 1 Lord Raymond, 203. 2 Cruise, 283. Douglass, 757. In Douglass, 225, Lord Mansfield says, "it is perfectly clear and settled, that when an estate can take effect as a remainder, it shall not be construed to be an executory devise or shifting use." This principle precisely meets the case of the plaintiff in error. The same point is settled, 3 T. R. 485. 2 Cruise, 285.

The counsel for the defendant in error insist that this is a vested remainder at the birth of the first child of Morris and wife; and that we do not attend to the distinction between remainders vesting in interest, and vesting in enjoyment. We have endeavoured to pay a due regard to this distinction.

A remainder vests in interest whenever the person is ascertained, and is *in esse*, and has a fixed right of future enjoyment. In the authority cited by the counsel, Fearn, 215, the remainder is absolutely limited to a person *in esse*. Now in the case before the court, it was not absolutely settled that the children would take: it could not on the view we have taken of the deed of settlement be absolutely ascertained until the parents' death.

It is said, here is a person *in esse*, ascertained, and capable to take if the particular estate falls; and it is therefore a vested remainder. But the fallacy of this position is in this: he is capable of taking, that is, he is the person who may take, but he is not capable of taking, because he is not in a condition to take. Mrs. Morris had just as much capacity to take as the children. But who shall take, is not ascertained. No one has a fixed and absolute right, nor can this be the case until the death of Mrs. Morris. The facts of the case fully exemplify the application of these principles. Mrs. Morris was married, had children, and had a brother who

would be her heir at law, should she die leaving no children. Now if she should have survived her children, her brother would take the estate. Is this not a case of mere survivorship? Preston, 7. Croke Eliz. 630. *Denn v. Bagshaw*, 4 D. & E. 512. 4 Johns. 61.

We say that as this remainder was capable of taking place as a regular remainder, it cannot take effect by way of shifting use. The law is fixed upon this point; there is no principle which would induce the Court to give it a construction to operate as a shifting use.

The operation of such a view of the case will show that it cannot be adopted. A son is born: we say the estate cannot be vested, because it is not ascertained that he will have it. If it does vest, it may defeat the whole purpose of the settlement. The counsel for the defendants in error say it shall vest; and if events make it necessary, we will divest it by the doctrine of shifting uses.

What will be the consequences of such a principle? On the birth of a son the remainder vests; he dies within a few hours after his birth: where is the estate then? It cannot go back to its original situation — once vested, it is no longer a contingent remainder. It has gone to his paternal uncle, out of the family. Suppose another child born, how can it go back? It never can by shifting use; for there can be no conveyance by shifting use, which conveyance is not provided in the deed. There is no provision in the deed that if the estate has been once vested in the right heirs of the children, it shall afterwards be divested. When the estate has once gone to the right heirs of the children, it is irrevocable — the whole force of the deed is spent.

Besides, the result would be, that to preserve the fee, to keep it safe, it should be transmitted to the Morris family, and be subject to forfeiture.

If the remainder was contingent, it fell on the attainder and banishment of Roger Morris and wife. This is the clear doctrine of law. Barland's case was like it. That was pronounced an escheat, and there was no attainder, no banishment. If a scintilla of the estate was left in the trustees, that passed by the act of attainder and banishment also.

Upon the claim of the plaintiff in error to be paid for his improvements, he argued that it was questionable whether the terms of the treaty were intended to apply to such a case.

This action is not brought to prosecute an interest in lands, by debt or marriage settlement; but for the mere lands themselves, to which an absolute title is created by a marriage settlement. The interest meant by the treaty was a lien on lands, not the lands themselves. This is apparent from an examination of the terms of the treaty. Marriage settlements are coupled with debts; and an interest in lands by debt can only be a lien; and an interest in lands by marriage settlement, when found in this connection, can only mean a charge on land by settlement deed.

It is to be observed that the treaty provides for any interest in land, whether by debt, marriage settlement, or otherwise. Now, if this means a claim to the land itself, these things would follow:

1. Suppose the children had been put into the act of attainer, they could have pleaded the treaty, because they had an interest in the land; that is, a title to the land itself, under the marriage settlement. This was their "just right," and the confiscation act would have been an impediment.
2. Morris and wife might have sued in their life time, for they had an interest in the land under a marriage settlement.
3. The comprehensive term "or otherwise," would have let in everybody named in the act. This would have repealed all the confiscation acts at once; which the treaty did not do. It only recommended their repeal. There is nothing to operate against the statute but the treaty.

He contended that the treaty did not apply to this case. Its application could not interfere with the rights of those who had improved the property and added to its value; so that when it was recovered, the party who recovered obtained more than his title originally gave him. The treaty protects the just rights of those who are included in its provisions; but the party who has recovered the land cannot say he has a just right to the improvements made on the land — not made by an intruder, but by a purchaser of a title which was good during the life of Morris and wife. The laws of New York

relative to this subject, would be in force against her own citizens; and it could not have been intended that British subjects should have rights and privileges greater than our own citizens. The law interposes no impediment to the recovery of the property the grantee of the children of Morris and wife are really entitled to; it allows them to recover the land in the situation it was at the time of the settlement, and as it was, if Morris and wife had died a natural, instead of a civil death, in 1779.

Argument in the Case of Wilcox et al. v. Executors of Plummer

UNITED STATES SUPREME COURT, January Term, 1830.¹

PROBABLY no case involving merely private rights in which Mr. Webster was counsel, better illustrates his remarkable skill and clearness in argument, than this brief and simple one in which the defendant's executors were sued for his negligence and unskilfulness as a collecting attorney in bringing suit only against the maker of a note received by him for collection, and not against the indorser also. The maker of the note having proved insolvent, in a subsequent suit against the indorser, the defence was the statute of limitations. The question being when that statute began to run, it was held, following Webster's argument closely, that it was not when the actual damage was sustained by the plaintiffs because of the unsuccessful ending of the first suit after the discharge of the indorser by lapse of time, but that, upon the violation of the attorney's implied contract to use reasonable diligence, he became immediately chargeable with the negligence and unskilfulness, and was then liable to suit.

Mr. Webster for the defendant said :

The question is, whether the statute of limitations was not a sufficient bar to both counts in the declaration?

To consider them separately. The first count alleges, that no suit was brought against the indorser, until he was discharged by the act of limitations; which was on the 9th of November 1822. Mr. Plummer received this note for collection on the 28th of January, 1820. He sued the drawer of the note, and had judgment in August, 1820; but obtained no satisfaction, the drawer having failed. According to the

¹ Reported in 4 Peters, pp. 172-183.

allegations on this count, he then delayed more than two years before he took any steps against the indorser. This was negligence clear and actionable. He should have used all reasonable diligence, and as soon as he intermitted that diligence, he was liable to an action for neglect. The cause of action against him is, his omitting to sue the indorser so soon as he ought to have sued him; and the true question is, when did this cause of action arise?

The plaintiff contends, that this cause of action arose when the indorser was discharged by lapse of time; but this cannot be maintained. Suppose there had been no statute of limitations by which an indorser would have been discharged, would not an action have lain against Mr. Plummer for not suing him? He had a reasonable time, according to the course of the courts, and the practice of the country, within which to sue the indorser; and if he did not sue within such reasonable time, he himself was subject to a suit for negligence.

He had promised to use all common diligence to collect the note. Uncommon delay was a breach of that promise, and a case of action. It is not at all material to this cause of action, whether the full extent of damage was then ascertained or not ascertained. It was enough that there was a cause of action. From that moment the statute began to run. The law regards the time when the cause of action arises, not the time when the degree of injury, more or less, is made manifest; and when the cause of action is a breach of promise or neglect of duty, the right to sue arises immediately on that breach of promise or neglect of duty; and this right to sue is not suspended, until subsequent events shall show the amount of damage or loss. This may be shown at the time of trial; or indeed if it be not actually ascertained at the time of trial, the jury must still judge of the case as they can, and assess damages according to their discretion.

A rule different from this would be attended with one of two consequences; either no action could be brought in such a case until the full amount of injury was ascertained, or a fresh and substantive cause of action would arise on every new addition to the probability of loss.

The cases are clear and decisive to show that in such cases

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as this, the cause of action arises with the original neglect. *Short v. M'Carthy*, 3 Barn. & Ald. 626, 630, 3 Eng. Com. Law Rep. 403. *Battleley et al. v. Faulkner et al.* 3 B. & A. 288, 3 Eng. Com. Law Rep. 289. *Howell v. Young*, 5 B. & C. 254, 11 Eng. Com. Law Rep. 219. 2 Saunders on Pleading and Evid. 645.

Howell v. Young is much like this case. It was an action against an attorney for negligence, where no loss actually resulted, and where the negligence itself was not discovered for some years. The court held the action accrued from the time of the breach of duty. There the action was case; but the court looked to the real nature of the transaction, and applied the statute to it, disregarding the form of action. Holroyd, Justice, said, "the loss does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or negligence of the attorney, and consequently there is no new cause of action." This language is strictly applicable to the case before the court. Omitting to sue, beyond a reasonable time, Mr. Plummer was guilty of negligence; a cause of action had then accrued against him: his omitting still farther to sue was no new neglect; it was no new cause of action, but merely the continued existence of the former cause.

Counsel below illustrated this rule of law very well by referring to the cause of action for defamation. If words, not in themselves actionable, be spoken, and special damage result, the party injured may sue within the time limited for such suits after the happening of the injury; because, in such case, the specific injury is the cause of action. But if words be spoken which are of themselves actionable, and special damage result also, in such case, notwithstanding or not regarding the time of the happening of the special damage, the statute of limitation will run from the time of speaking the words.

It seems to have been contended for the plaintiff, in the court below, on this first count, that Mr. Plummer was bound to sue the indorser; that this was a continuing obligation; and that every day furnished a new fault and a new injury, till the claim on which he should have sued was extinguished.

If this mode of argument be plausible, it is no more. The same reasoning would apply, and with equal force, to every case of implied promise. If one borrows money, it is his duty to pay; and he is in default every day, and commits a new injury, every day, until he does pay. Yet the statute runs in his favor from the day when he first ought to pay.

Mr. Plummer was bound to sue at the first court because that was reasonable time; not suing then, he was from that moment liable to an action for negligence; and supposing him not to have sued at all, as this first count charges, his fault was then complete.

But the true view of the case, no doubt, is that attempted to be raised under the second count. Mr. Plummer did sue; but he sued negligently, or unskilfully. He brought a suit against the right party, on the plaintiffs' note; but he misdescribed the plaintiffs. This was his error. Here was the negligence; and, therefore, here the cause of action. He might have been sued for this negligence the next day after he issued the writs; and the plaintiffs would have been entitled to recover such damages as they could show, at the time of trial, and on the trial, they had sustained. This original error in the attorney was a breach of duty, from which the failure in the suit resulted as a consequence. The failure in the suit was not his breach of duty; the loss of the debt was not his breach of duty. These were both but the consequences of that breach. They were its results, and they fixed the measure of damages, but were not the negligence which was alone the cause of action. It is established law, that the limitation of the statute is to be referred to that act or omission which gives the cause of action, without any regard to the consequences which ascertain the amount of damages. 1 Salk. 11.

In the view which the plaintiffs' counsel takes of this matter, it would necessarily follow, that after the first term, or court, in which Plummer could have sued, and ought to have sued, the plaintiff had a new cause of action against him, every day, for three years; each day's neglect being, as it is said, a new default, or new cause of action. If each day's neglect be a new default, and new cause of action, it is

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quite clear that the pendency of a suit for yesterday's default would be no bar to a suit founded on a default of to-day; and if these causes of action be, as is contended they are, all new, independent and distinct, then it follows that independent and distinct damages may be given in each. Arguments can be no more than specious which lead to results like these.

Arguments in the Cadiz and Lisbon Cases

WASHINGTON, June 8, 1835.¹

The Cadiz Cases.

IN the year 1810, the French laid siege to Cadiz, on the land side, but did not and could not blockade the harbor effectually, or indeed at all, the English and their allies, the Spaniards, having complete command of the sea.

In this state of things, American vessels, laden with provisions and other merchandise, the growth and produce of the United States, and the property of their citizens, and bound to Cadiz, were seized by the French, and their cargoes destroyed or condemned on the ground that their destination was a violation of the siege; and the question is, whether this siege was warranted by the law of nations? It is maintained that it was not so.

1st. It was not so, on the ground that these provisions might supply the enemy's forces; for they were the productions of a neutral country; and though a neutral cannot carry provisions, the growth of the enemy's country, or of the country of their allies, to places occupied by their fleets or armies, or to places of military equipment for their use, yet he has an unquestionable right to carry to them the growth of his own country. The case of the *Jonge Margaretha*, in 1 Robinson's Reports, and that of the *Commercen* in 1 Wheaton, the cases which carry the belligerent's rights furthest in this respect, while they condemn provisions the produce of the enemy, or his allies, thus carried, both expressly admit that provisions are

¹ From a pamphlet in the Boston Public Library.

not to be condemned in such cases, if they are the produce of the neutral country.

2d. The seizure was not warranted on the ground alleged by the French, that the destination was a violation of the siege.

The principles and rules which prohibit intercourse with besieged places are precisely the same which prohibit intercourse with places blockaded; and this prohibition is not absolute and complete unless the siege or blockade be complete also; that is, unless the place be completely invested. If any place be closely invested on the land side, but not effectually blockaded on the side of the sea, neutrals may lawfully have free intercourse with it by sea. So, if it be effectually blockaded by sea, but not invested on the land side, neutrals may have free intercourse with it by land.

The latter case, the only one likely to arise in the British courts, but to which the former is strictly correlative, has been repeatedly so decided in the British Court of Admiralty. The following is from Chitty's Law of Nations, p. 143 &c.:

“If a place be blockaded only by sea, it is no violation of the belligerent rights for a neutral to carry on commerce with it by inland communications. In the case of the Ocean,* which was a case arising out of the blockade of Amsterdam, Sir William Scott said,

“‘The legal consequences of a blockade must depend on the means of a blockade, and on the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally; the internal communications of the country were out of its reach, and in no way subject to its operation.’

“And in another case† arising out of the same blockade he said,

“‘The blockade of Amsterdam is from the nature of the thing, a partial blockade, a blockade by sea; and if goods are going to Emden, with an ulterior destination by land to Amsterdam, or by

* 3 Robinson, 297, and in American edition, 241.

† Jonge Pieter, 4 Robinson, 79, in American edition, 68. Stert, 4 Robinson, 65, in American edition, 54.

an interior canal navigation, it is not, according to my conception, a breach of the blockade.' ”

There is no principle more completely and universally established than this, that a belligerent cannot prohibit the intercourse of neutrals by sea, with any port of his enemies, unless he actually blockade it with an adequate naval force. But if a mere partial investment by siege on the land side were sufficient to prevent intercourse by sea, then a blockade might be established in effect without any naval force whatever.

The decision of the French courts in these cases is sanctioned by no principle, and supported by no authority.

If it be asked why the decisions of the French courts on this subject are not to be as much respected as those of the British, it is answered that such decisions are not in themselves binding on other nations, but only evidence what the law of nations is ; and the evidence of a belligerent against the extension of his own rights is like other evidence against him who gives it, of the very strongest character, if not conclusive ; while his evidence in favor of extending his claims beyond what any respectable writer or impartial tribunal ever admitted, is unworthy of regard.

And besides, the setting up and enforcing this unwarrantable pretension by the French is the very aggression complained of, and surely, it would be preposterous to consider it a justification of itself.

DANIEL WEBSTER.

F. C. GRAY.

Cases of Compromise with Captors.

The undersigned ask leave most respectfully to submit to the Commissioners, a few remarks on the mode of estimating damages in that class of cases which are called compromise cases.

It is understood to be under consideration with the Board, whether in those cases a general account of the voyage, or the shipment, should not be opened, and if it would appear upon the whole, that notwithstanding a part of the cargo, or of its proceeds, had been unlawfully taken, yet that the entire voyage,

or shipment, resulted in no loss, any allowance out of this fund ought not to be refused.

This idea rests, as the undersigned understand, upon some such course of reasoning as the following: That the general rule is that a claimant shall receive no more than an indemnity; that the Commissioners are bound to proceed according to equity; that equality is equity; that of two claimants for vessels seized at the same time and place, one, whose property was condemned or sequestered, can receive only the amount of cost and damages; that the other, the one half of whose property only was seized or condemned, may have made profitable sale of the other half, and therefore, if he may recover costs and charges for the part taken, he is evidently better off than his neighbor; that this would not be equality, and therefore not equity. To bring about this equality, and, therefore, equity, it is said France should be charged with the cost and charges of the whole, and credited with whatever may have been received, in any way, as the proceeds of any part.

The undersigned are constrained to say that they think there are very solid objections to this reasoning, and to its results. In the first place, its obvious result is, to hold the trespasser quite released and exonerated from the effects of his own trespass; for it is not to be forgotten that the fund which the Commissioners are to distribute, is a fund furnished by the wrong-doer, to compensate for his wrong; and it ought clearly to be extended and distributed to every wrong fairly proved against him. A rule of distribution which in a particular case gives no compensation at all for property seized and condemned, in a manner confessedly illegal, cannot, as it seems to us, be founded in justice, nor be conformable to the treaty.

It appears to us that the error of the argument lies in stating the case. We admit that the Board is bound to proceed according to the rules of equity, and that it would have been so bound, and precisely to the same extent that it now is, if the word "equity" had not been used in the act constituting the Board; because, in these cases, we know no difference between the rules of law and the rules of equity. They are commercial cases, turning on familiar principles, which have grown up and become well known in modern times, and which govern

courts of law and courts of equity with equal authority. When the claim is for money, so that the forms of law are competent to raise the true question, the rule of decision, we suppose, to be exactly the same, in the strictest court of common law, and in courts of equity. The statute, it needs hardly to be said, by the word "equity," does not mean any notional or imaginary justice, resolvable into no rule, and founded on no principles acknowledged in other cases. Other acts of Congress, and very many of them, confer powers to be exercised according to law and equity; but it has never yet been supposed that this equity, thus made a rule of decision, was any other than that established and well known legal equity, resting upon principles generally acknowledged, and kept within limits which sound reasoning, judicial determinations, and the general practice, both of tribunals and of individuals in their relations and dealings with one another, have settled and made familiar. There is no equity in these cases which is not a matter of right; and on the other hand, there is no right of which a man ought to be deprived, on any idea of equity existing in behalf of another. If he have right he has equity; if he has no right, he has no equity. Indeed, we are not aware that any effect is produced by these words in the acts of Congress which prescribe the rules of decision to the Board. Those same rules would have existed, and been obligatory, whether mentioned in the act or not; and it is, at any rate, quite clear that the act neither extends the benefits of the fund to any not embraced in the treaty, nor withholds it from any who are.

Now it appears to us, that where the captors have taken away, illegally, one half a man's cargo, he has a fixed and clear right, under the plain provisions of the treaty, to a compensation for that half, however fortunate he may have been in the disposal of what was left. And this brings us to the opinion which we have already expressed, that the fault of the argument on the opposite side, lies in stating the case. The argument assumes that, in the case supposed, equal injury was done to the owners of both vessels. Now this is not so. He whose property was all taken, suffered twice as much injury as he whose property was only half taken. This appears to us to be plain and undeniable. And how can the Board under-

take to make those equal whom the chances of fortune, or the arbitrary will of others, have made unequal. This would be for the Board to undertake to interfere with the casualties, the turns of good or ill luck, which happen to individuals, and to assume the task of equalizing among them, the gains and losses, which may have happened to each from distinct and separate causes. Certainly no such task can be in contemplation of the Board. It can be no part of its duty to place all parties who undertake similar adventures in the same condition in the end, let what will have happened to one, and what will have happened to another. No rational idea of equity or equality, can go to such a length as that.

Three persons fit out vessels for the same place with similar cargoes. One vessel goes free, makes a profitable voyage and returns. Another is stopped, one half her cargo is seized, but she is permitted to proceed with the remainder; and on this remainder she makes a voyage so profitable as to enable the owner to pay for the cost of the whole cargo, out of the proceeds of the part not taken. The third vessel is arrested, and her whole cargo seized; of course, with her, it is all loss and no profit. Now, any attempt to equalize these cases would be an attempt, not to make men's rights equal, but to make their fortunes equal. It would be an attempt to reverse facts and events; to create rights; not to provide for them just rules of compensation when invaded.

In these three supposed cases, nobody imagines that the owner of the first vessel, he who had the good fortune to escape arrest, can be bound to contribute to the losses of the second and third; and if such owner should have a claim on this fund, arising out of some other distinct seizure or capture, that claim could not be rejected, or diminished, in order that the fund might hold out the better, for the benefit of the owners of the second and third vessels. For the same reason, it appears to the undersigned, and appears to them to be quite as plain that the owner of the second vessel, he whose property was half taken, is not to be refused an allowance, in order that he may be no better off than the owner of the third vessel who lost all, or that this last may have an increased allowance.

The owner of the second vessel, who lost half, has a right fixed by the treaty, on this fund, because he has been a sufferer, and is one of those who have claims, and for whose indemnity the fund was provided. He has a claim on France, just as clear and distinct, as if his whole cargo had been taken. To the extent of this claim he is entitled to compensation, and it seems to us quite clear that the Commissioners cannot follow the residue of the cargo, to see whether he made profits by that, any more than they can inquire into the results of any other voyage which he may have undertaken.

It may be said, that if the proceeds of the half of the cargo which was saved shall be sufficient to cover the cost and charges of the whole, the owner is already indemnified.

It appears to us, with entire deference, that this is a very incorrect view of the matter. Indemnified for what? Indemnity supposes injury; it is compensation for loss. Now, in this case, what has been the injury and the loss? Clearly, the injury and the loss consist in the illegal seizure and sequestration of one half the cargo; and what compensation or indemnity has been received for that? Certainly none. The profit made on the one half not seized, is, in no sense, a compensation for the wrong of seizing the other half. Besides, if the profit made on the part saved, would, by possibility, be considered as indemnity for the part taken, it could only be in a loose and incorrect sense, and could mean no more than that the owner, on the whole, was no loser by the voyage. But still, though not on the whole, a loser by the voyage, he has sustained a loss, for which he is entitled to compensation by the very words, and indeed, the whole object of the treaty. The fund is to be distributed among those having claims for illegal seizures. Has not he a claim, one half of whose cargo has been seized? And is he not entitled to compensation for it? The treaty says nothing of indemnity. It was no part of its purpose, or object, to indemnify merchants in a loose and general sense, for the losses they might sustain in their maritime expeditions. This object is single and precise; it is to secure compensation to every one who has a claim on France, for illegal seizures and condemnations. If property has been seized, its owners are entitled to a compensation, *pro rata* with

others for that seizure, whatever may have happened to property not seized.

Both equity and equality require, not that persons undertaking commercial enterprises should be placed in the same condition in the end, but that the same rule should be applied to them under the same circumstances. He who has lost half his cargo, shall receive the application of the same rule, the same proportion, the same rate of allowance, as he who has lost all. The thing to be compensated for in both cases, is the property taken, and the rate of compensation is to be the same. This is equity, and this is equality.

We might use another illustration. Suppose two owners sent out vessels with cargoes of the same value. Both are arrested, and the half of each cargo taken. Here the injury is exactly the same to each. The wrong-doer, with the property thus taken from both, goes his way; but the vessels separate, one goes with the remaining part of her cargo, to a port which happens to furnish a good market, and sells that remaining part at high prices; the other, with the remaining part of her cargo, goes to another port, where she happens to find a bad market, and sells low. Both, in due time, claim before this Board, a compensation for the injury done them; and can it be said that they ought to receive unequal amounts of allowance?

Is it not evident that if a greater allowance should be made to one than to the other, it must be made, not on account of any greater degree of wrong or injury committed on the owner by the French cruiser, but on account of his misfortune or mistake, in going afterwards to a bad market, with what was saved of his cargo. Would not this be an attempt to equalize the results of different markets, rather than to apply the same rule of compensation to equal injuries? Would it not bring into the consideration of the injury, and the damage resulting from it, things no way connected with it?

The same observations which are applicable to cases, in which a part of the cargo has been specifically taken, apply also, as it appears to the undersigned, to cases in which there has been a forced sale, and a division of the proceeds. They perceive no distinction in principle, and therefore do not make a distinct point, as arising in the last mentioned cases.

The undersigned have submitted these remarks, mainly for the purpose of asking of the honorable Commissioners, a full consideration of the subject, and a review of any impressions which may, at first view, have been adopted; and they doubt not that in the end a reasonable and just rule of allowance will be established in this as in other cases.

DANIEL WEBSTER.

F. C. GRAY.

Lisbon Cases.

The undersigned is concerned in sundry cases of captures of vessels, bound to Lisbon, with provisions, the product of the United States, while the British armies were in Portugal; and these provisions were shipped, doubtless, under the expectation, that the presence of those armies would increase the consumption, and of course the demand, of similar articles in that market.

The undersigned supposes these voyages to have been perfectly legal, and that the captures of vessels engaged in them are clearly within the treaty.

Not being informed of the argument on which an opposite opinion may rest, or on which doubts may be raised, he proceeds to state shortly the general grounds of his own judgment.

The question is, were these voyages lawful?

It would seem to be a satisfactory answer to this question to say that they have been universally held lawful in all the commercial States of the Union. Losses arising on such voyages, have always been recovered and paid as happening in the course of lawful trade; and it is not known to the undersigned that a single exception to this remark exists in regard to any State or any tribunal in the United States. Some of the claims represented by the undersigned, and arising out of these voyages, are held by underwriters. When the losses occurred the underwriters in the full conviction of their just liability, paid the amount of their subscriptions. Merchants supposed the trade lawful; professional men supposed it lawful; and the courts of law, held it to be lawful. Such being the general sentiment of the country, and its tribunals, it might be presumed that no further inquiry were necessary.

2. But independently of this universal understanding the trade was entirely lawful, and well warranted by the law of

nations. It is competent under the code of national law for a neutral to carry provisions, the product of his own soil, to one of the belligerents, in all places not closely besieged or effectually blockaded. Lisbon was neither closely besieged nor effectually blockaded. It was occupied, it was true, by English forces; but the occupation of Lisbon by English forces could not make it more belligerent, in regard to trade, than England herself; and there can be no question, it is supposed, that if England had chosen to open her ports to the flour of the United States, it might have been lawfully carried to her in American vessels. It might have been carried to London, her capital, or to Portsmouth, her place of naval equipment. It might not have been lawful, and would not, according to the decisions of the British admiralty, to carry provisions in a vessel of the United States, from England, to the support of the British armies in Portugal. This course of business would be liable, possibly, to be regarded as an attempt to enter into the transport service of her enemy. But a direct trade from the United States to Lisbon, then in British possession, in articles of provision, the growth of the United States, is a trade against which the undersigned is not aware that any rule of the law of nations, or any decision of the tribunals of the commercial world, has anything to object.

It is necessary only to refer to the cases of the *Jonge Margaretha*, 1 Robinson, 161-163, and the *Commercen*, 1 Wheaton, 382.

These cases approach as nearly as any known to the undersigned to the question under consideration. They are cases which carry the belligerent right as far as it has ever been carried. Now in each of these cases the property condemned was the produce of a country other than that of the owner, and the condemnation proceeded on that ground; and in both it is admitted to be lawful for a neutral to carry provisions the produce of his own soil, to a belligerent. In the first, the language of the court is:

“Is this a legal transaction in a neutral, being the transaction of a *Papenberg* ship carrying Dutch cheeses from Amsterdam to Brest, or Morlaix, (it is said,) but certainly to Brest? Or, as it may be otherwise described, the transaction of a neutral carrying

a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war, of provisions, which are a capital ship's store, and to the great part of the naval equipment of the enemy."

"Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country, and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities."

In the second case, that of the *Commercen*, the judges were divided in opinion as to the case before them, some of them being in favor of a restitution of the property. A majority however, were for condemnation in that case; but they made an express exception for such cases as those now under consideration; they say "another exception from being treated as contraband is where the provisions are the growth of the neutral exporting country."

The undersigned supposes these decisions to cover in all respects the cases represented by him; and, being from courts of the highest authority, he supposes it is not necessary to add others. If there be any view of this question which the undersigned has not met, in these few remarks, he will be glad, at the proper time, to be informed of them, that he may consider them. He will now only add that he finds nothing in the treaties between the United States and France, which varies the general rights of neutrals in this respect.

The undersigned is concerned in the case of the *Telegraph*, a New York ship, as well as other cases which may be affected by the questions in relation to which these remarks have been made, and he wishes them, of course, to be considered in connection with that case. If the doubt be whether Lisbon might not have been considered as in a state of blockade, the undersigned would be very much obliged to the Board if they would inform him of the general grounds of that doubt, and the general facts which gave rise to it, at some convenient time, so that a further consideration may be had of that part of the case.

DANIEL WEBSTER.

The Title of the Duke of Alagon

MARCH 4, 1836.¹

IN 1817 the Duke of Alagon received a grant from the King of Spain of a large tract of land in the Province of East Florida, as a *bona fide* reward for services. By the Treaty of 1819 between the United States and Spain a cession was made, by the latter nation to the former, of the whole territory in which the lands granted were situated, with all the vacant lands, &c., which were not then private property. Upon the question whether the grant to the Duke of Alagon was legally annulled by the Treaty, which was ratified subject to an express declaration of the King of Spain that the Treaty annulled this and two other like grants, legal opinions were given by the Hon. Joseph M. White and Hon. Edward Livingston, as well as by Mr. Webster. Mr. Webster's Opinion was as follows:

1. I am of opinion, that the grant by the King, followed by possession taken in due and solemn form, constituted a good title to the lands, in the Duke of Alagon.

2. That this land having become private property, was expressly excluded from the cession, by the terms of the Treaty, as ratified by the King, by authority of the Cortes.

3. That the declaration, attached to the ratification by the King, being made by his sole authority, does not constitute a cession, by itself, nor enlarge the terms of the cession, to which the Cortes had assented.

4. That it does not appear that any revocation by the King had been made, or attempted, by a distinct act of revocation, or any other proceeding, except the declaration aforesaid.

I am of opinion, therefore, that the grant to the Duke of Alagon must stand, as private property secured by the Treaty.

DANL. WEBSTER.

¹ From a pamphlet in the Boston Public Library.

Argument in the Case of Charles River Bridge v. Warren Bridge

UNITED STATES SUPREME COURT, January Term, 1837.¹

THIS important and well-known case, in which Mr. Shaw, afterwards Chief Justice of Massachusetts was associated as junior counsel with Mr. Webster, for the plaintiff, was begun by a bill in equity filed by proprietors of a toll-bridge called the Charles river bridge in the Supreme Judicial court of Massachusetts for an injunction to prevent the erection of a bridge near that of the plaintiff, from Boston to Charlestown, which latter bridge the legislature of Massachusetts had authorized after incorporating the plaintiff company and granting them tolls, on the ground that the later incorporation was repugnant to the constitution of the United States as impairing the obligations of a contract. The supreme court of Massachusetts dismissed the bill, and its judgment was now affirmed by the Supreme court of the United States, to which the case was carried by writ of error. The leading point decided (Story, Thompson, & McLean, JJ., dissenting) was that, as it had already become established that public grants are construed strictly, and pass nothing by implication, the charter of the Charles river bridge was not a monopoly or exclusive privilege that was impaired as a contract by the subsequent charter granted to the Warren bridge.

Mr. Webster, for the plaintiffs in error, stated that the question before the Court was one of a private right, and was to be determined by the fair construction of a contract.

Much had been said to bring the claims of the plaintiffs in error into reproach. This course of remark does not affect their right to their property, if this Court shall consider that property has been taken from them by proceedings which vio-

¹ The case is reported in 11 Peters, pp. 420-650.

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late a contract; and in a case where this Court has a constitutional right to interpose for its protection and restoration.

It is said that the proprietors of Charles River Bridge have been repaid for the advances made by them in building the bridge. But this is not the question upon which the Court has to decide. It is a question of contract; and if it is so, where is the necessity to inquire whether the plaintiffs have laid out a million, or nothing? If there was a contract, the question is not what was the amount of profit to be derived from it, but what was its provisions; however advantageous to those with whom it was made. It is a contract for the annual receipt of tolls for a specified period of time; and it is said the state, which by its law brought the company into existence, by allowing these tolls, may break the contract, because the amount of the tolls is large; and by a legislative act, say, that, for a portion of the time granted, the contract shall not be in force!

The case has been argued before; once in the superior court of the state of Massachusetts, and once in this Court: and without any disrespect to the counsel who argued it before the present hearing, it has been exhibited on new and enlarged grounds.

It has been said, in the argument, that the right of eminent domain cannot be granted away by a legislative act; and if granted, the same may be resumed, against the express terms of the grant. The necessity of the existence of this right in a sovereign state, has been asserted to be shown by a reference to many cases; as the grant of a right to construct a turnpike, which, if it gave an exclusive right of making all communications between two places, to a corporation, or to an individual, would operate to prevent the introduction of improved modes of intercourse, as by railroads; and thus be most extensively injurious to the interest, and stay, to a fatal extent, the prosperity of the community.

The plaintiffs in error deny this position. They hold that the obligation of a contract is complete; and that other means than by its violation, may protect the interests of the community. Such a violation of a contract would be fatal to the confidence of the governed in those who govern; and would

destroy the security of all property, and all rights derived under it.

The localities of the two bridges, "the Charles River Bridge," and "the Warren Bridge," are well understood by the Court. They accommodate the same line of travel, and either of them furnishes all the convenience, and all the facilities the line of travel requires. That one is sufficient, is shown by the fact which is not denied, that since the Warren Bridge has become free, all travellers pass over it, and no tolls are received by the proprietors of the Charles River Bridge.

When the act authorizing the Warren Bridge was passed, and the company was about to erect the bridge, the plaintiffs applied to the superior court of Massachusetts for an injunction to prevent the work going on. This was refused, on grounds that nothing had been done by the company which presented the question of the unconstitutionality of the law. Before the Warren Bridge was in the actual receipt of tolls, the bill now before the Court was filed; and afterwards a supplemental bill, the proprietors of the Warren Bridge being in the actual receipt of tolls; claiming that the charter under which they acted was a violation of the contract of the state, with the proprietors of the Charles River Bridge, and was therefore against the constitution of the United States. The case is now before this Court, on this question.

It is said that Boston has many of such bridges as that constructed by the plaintiffs. This must necessarily be so. Boston is an exception in the ocean. She is almost surrounded by the waters of the sea, and is approached every where, but in one part, by a bridge. It is said that those numerous bridges have given rise to no litigation. This is so, but the just inference is, that by no one of these has a right been interfered with. In fact, in all the cases where rival bridges, or bridges affecting prior rights have been put up, it is understood that there have been agreements with those who were or might be affected by them. This was the case with West Boston bridge. It was purchased by those who sought to make a free bridge which would interfere with it.

It has been said, in argument, that the ferry franchise, which was the property of Harvard college, was seized by the legisla-

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ture when they authorized the erection of the Charles River Bridge. But this was not so. A compensation was allowed for the use of the franchise or its interruption; and no objection was ever made to it by that institution. The just inference is that a previous agreement had been made with the college, and that the sum annually paid by the proprietors of Charles River Bridge, was entirely satisfactory to that corporation.

Mr. Webster then went into an examination of the circumstances which had attended the erection of other bridges from the main land to Boston; and he contended, that in all the cases, compensation had been made to those who were injuriously affected by them. In the case of the Cambridge bridge, the legislature, in the act authorizing it, extended the charter of the proprietors of the Charles River Bridge, as a compensation for the erection of another bridge. This was a compensation for the tolls taken by diverting the line of travel. In none of these cases was there an appeal to prerogative, and to its all-superseding powers.

The history of the Warren Bridge exhibits an entirely different state of things. It was undertaken on different principles, and under a different temper. It began with a clamor about monopoly! It was asserted, that the public had a right to break up the monopoly which was held by the Charles River Bridge Company; that they had a right to have a free bridge. Applications were frequently made to the legislature on those principles and for that purpose, during five years, without success; and the bill, authorizing the bridge, when it was first passed by the legislature of Massachusetts, was rejected by the veto of the governor. When the charter was actually granted, it passed the legislature by a majority of as many members as there were hundreds in the body.

If it had not been for the provision in the constitution of the United States, under which the plaintiffs now ask for the protection of this Court, it is believed the law would not have been enacted. Members of the legislature consented to the law, on the ground that if it interfered with chartered rights, this Court would set it aside. The argument was, that if the law was a violation of the charter, it would be of no avail. Thus it passed.

But since its passage, there is an appeal to the right of eminent domain to sustain it. It is said, take care! You are treading on burning embers! You are asking to interfere with the rights of the state to make railroads, and modern improvements, which supersede those of past times by their superiority! You prevent the progress of improvements, essential to the prosperity of the community!

It would then appear that the existence of the provision of the constitution of the United States, which this Court is now called upon to apply, has been the whole cause of the injury done to the plaintiffs, by the passage of the law authorizing the Warren Bridge. But for the belief that the rights of plaintiffs would be restored by the appeal to that provision, the law would not have existed.

The learned gentleman who first argued the case for the defendants, went the whole length of asserting the power of the legislature to take away the grant, without making compensation. The other gentleman asks if the plaintiffs are not yet satisfied with exactions on the public? What are exactions? They are something unjust. The plaintiffs have taken tolls for passing the bridge; but this they had a right to do by their charter.

It is said the tolls were oppressive; but is it oppression when the right was given by the charter to take them as the stipulated income for capital laid out under the charter? It is said that the public are on one side, and the plaintiffs are on the other; that if the case is decided one way, a thousand hands will be raised, to one, should the decision be different; but this is not correct. The public sentiment, in this case, is not on one side. It is not with the defendants. The representatives of Boston, never voted for the Warren Bridge. They thought there were existing vested rights, which ought not to be disregarded. The city of Boston would have purchased the right of the Charles River Bridge, if they had been asked. The property, or stock in the bridge, was dispersed through the community; it was not a monopoly.

The honor of Massachusetts will stand unblemished in this controversy. The plaintiffs impute no dishonor to her, or to her legislature. Massachusetts only wants to know if the law

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in favor of the Warren Bridge, has infringed upon the vested rights of the plaintiffs; and if this is so, she will promptly make compensation.

The plaintiffs say, the act authorizing the Warren Bridge has violated the constitution of the United States; and if this Court shall so declare, the state of Massachusetts will do full justice to those who have been injured by her authority.

The counsel for the defendants have said that the plaintiffs have sustained no loss but that of their golden prospects. They have lost all their property; a property worth three hundred thousand dollars before the new bridge was built, and now not worth thirty dollars.

The rights of the plaintiffs are no monopoly. They are the enjoyments of the property for which they had paid in advance; and which, by a contract made by the law, they were entitled to enjoy for twenty years yet to come. They are called rapacious monopolists, when they claim to hold what they have purchased. Those who have assailed this property have taken it from them; have taken all from them without compensation. Where, and with whom is the rapacity to be found in the transaction?

The provisions of the law of Massachusetts against monopolies, are taken from the English statutes of James the first. They were so taken, for it follows that statute in terms, and contains the same exceptions in favor of useful inventions. Thus the Massachusetts law is the same with that of England, which has never been considered as extending to such cases as this before the Court. The language of the law is "monopolies;" but this is a "franchise," and not a monopoly; and thus the clamour which was raised has no application to the property of the plaintiffs in error. It is unjust, and without application.

The record presents the only questions in the case. What are they?

The original bill was filed in 1828, and after the answer of the defendants was put in, the amended bill was filed, only to put in issue the questions of law and fact, presented in the original bill.

The courts of Massachusetts proceeded in this case accord-

ing to the equity rules of this Court; and this case is fully exhibited, so that the whole of the issues of law can be decided here.

The original bill founded the rights of the plaintiffs:

1st. On the act of the legislature of Massachusetts of 1785.

2d. On the purchase by the plaintiffs of the ferry right which had belonged to Harvard college.

3d. On the consideration paid for the charter to build the bridge, and the prolongation of the charter for twenty years, by the act of 1792.

The plaintiffs say the act for the erection of the Warren Bridge violates the constitution of the United States; and that the act takes the property of the plaintiffs for public use, without making compensation for it. They rest on their charter.

The defendants, in their answer, do not say the property has been taken for public use, but they rest on their charter: and they say that the legislature had a right to pass the act, as it does not infringe the property of the complainants.

This presents the question, whether the constitution of the United States is violated? There is no other issue made on this record.

This state of the pleadings excludes much of the matter which has been presented by the counsel for the defendants. They do not present the question of eminent domain. The plaintiffs might have presented that question in the court of Massachusetts. They might have said that their property was taken by the law, for public use; and was taken under the right of eminent domain. This would have been a Massachusetts question; and one which could not have been brought before this Court. It is admitted that if the legislature of Massachusetts takes private property for public use, under the power of eminent domain, this Court cannot take cognizance of the case. If the case had been so put before the superior court of Massachusetts, that court could have decided that the complainants were entitled to compensation, and that the defendants were bound to make it.

It is the law of this Court that the parties must be confined to the questions on the record. The only issue here is the

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question whether the defendants have infringed the rights of the plaintiffs, and have violated the constitution of the United States.

While this case was in progress through the courts of Massachusetts, and depending in this Court, it appeared that one half of the tolls of the plaintiffs' bridge was taken away. Now the whole tolls are gone! This has occurred since the Warren Bridge has become a free bridge.

The legislature of Massachusetts have given to the plaintiffs the right to the franchise of a bridge at Charlestown; and the question is, whether this is such a right as that it can be violated or infringed? The franchise is a thing which lies in grant, and is, therefore, a contract: and if, by the charter to the Warren Bridge, it has been infringed, it comes within the prohibition of the constitution relative to contracts. The question is, whether the plaintiffs had such a franchise? This is the only question in the record.

A preliminary objection to the right of this Court to proceed in this case, has been made, on the suggestion that the case is one against the state of Massachusetts; as the state of Massachusetts is now the only party interested in the cause, the bridge having become her property; and it is said, against the state, this Court can grant no relief. A state cannot be brought into this Court, in a suit by individuals, or a corporation.

The state is not a party to the cause. The bill is against the persons who built the Warren Bridge; and it is from them relief is sought, and required; and those persons stand as trespassers, if the law, under which they acted, is unconstitutional. But after a suit is lawfully commenced, it goes on against all who afterwards make themselves parties to it. There is no effect on the rights of the plaintiffs by a change of this kind, as a wrong-doer cannot excuse himself by parting with his property.

The plaintiffs ask a decree against the proprietors of the Warren Bridge, John Skinner and others; and a decree is asked against no others. The question which is raised by the objection to the jurisdiction of this Court in this case, is, whether the Court can proceed in a case in which a state

has an interest? This cannot be asserted with success. If such were the law, the exclusion of jurisdiction would extend to all cases of lands granted by the United States; for in cases of such grants, if no title has been given, the United States are bound to make compensation. Such a doctrine would overrule the judicial structure of the government, and prevent the administration of its most important functions.

This question has been decided in this Court, in the case of *Osborn v. The Bank of the United States*, 9 Wheat. 857; 5 Peters' Condensed Reports, 768.

This is precisely the same question with that in the case referred to. The state of Ohio claimed the money in the hands of Osborn as a tax on the funds of the bank of the United States, imposed by an act of the legislature of the state. The state of Massachusetts claim the tolls of the bridge, derived from a law of the state. This Court, in the case cited, expressly declare it to be one in which the state is a party. So in *Fletcher v. Peck*, where Georgia had declared a deed given by the state for lands, void, but the parties to the case were those on the record; although the decision directly vacated the proceedings of the legislature of Georgia, yet the Court had jurisdiction. In this case, no judgment will be pronounced against the state of Massachusetts. On these pleadings, if the constitutional question were out of the case, could any action of the Court affect the state? She is, in fact, no party in this cause. She cannot be a party to blow up a suit, and not be subjected to its final result. Suppose a state should coin money, congress would not prohibit its being done. It is prohibited by the constitution; and a law could not do more. Could the law be carried into effect? Proceedings under it would be brought before this Court, by an action against the agents of the state, or by a suit against the party issuing it, or making a contract for the money so coined. If you cannot, by a suit against an individual, question the unconstitutional acts of a party, the whole of the powers of the constitution, upon its great and vital provisions for the preservation of the government are defeated.

It has been said, the Court can do no justice to the parties

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who have sought its protection, because the superior court of Massachusetts has only a limited jurisdiction in cases of equity.

It is admitted, that the equity jurisdiction of the courts of Massachusetts is limited; but it has all the jurisdiction over the subject, to which its powers extend, as any other court of equity. The law of Massachusetts gives full equity powers to the court, in all cases which are made subject to its jurisdiction; 6 Pickering's Rep. 395. The law of 1827, gave this jurisdiction in all cases of waste and nuisance.

This bill prays for general relief. This Court may abate the nuisance, and decree a repayment of the tolls; and do all in the case, that, according to law and equity, may appertain to it. In equity, a court may enjoin against the nuisance, and decree a compensation.

But all this discussion about the power of the court of Massachusetts to make a suitable decree, has no place here. This Court can, in their decree, declare, whether the act of 1828 does impair the contract of 1785. This is all the Court can do; and it is nothing to them what will be done in the case, by the court to which the case will be remanded. In conformity with the provisions of the judiciary act of 1789, this Court remands a case when further proceedings are necessary in the court from which it may have been brought; when nothing else is required in that court, this Court will give a final judgment.

In this case, the Court are bound down by the record to the single question of the validity of the law, under which the defendants acted.

To proceed to the main questions in the cause:

1. The plaintiffs claim to set up a bridge, exclusively, between Boston and Charlestown; or, if they are not entitled to this, they claim to put down all such other bridges as interfere with the profits and enjoyments of their privileges.

It is not contended that the termini include or exclude all within the place. Every person must keep so far off, as not to do a direct mischief to the plaintiffs' rights. The plaintiffs say, that the ferry right gave them the privilege of excluding rivals; that by the charter, they have a franchise which

gives them rights which cannot be violated by the proceedings of a subsequent legislature.

It is in vain to attempt to derive anything from the ferry right, if it is what the defendants say it is. They say, that a ferry is a path over a river; and that the English law relating to ferries never was in force in Massachusetts. This position is denied by the plaintiffs. In support of this assertion, they give a bead-roll of ferries which have been taken away; and bridges built where they before existed. This is statement.

The law of Massachusetts has always been the common law of England. Is there any authority for the contrary, in any of the decisions of her courts? There may be such, but it is hoped not, and it is believed not. Have the ancient fathers of the profession of the law; the Parsons, the Sedgwicks, the Danes, taught other doctrine? Has the contrary been sustained by these men; by their opinions? In the case referred to by the counsel for the defendants a distinguished lawyer of Massachusetts allowed a ferry right according to the common law of England. Every judge in Massachusetts has held a ferry right to be an indefeasible inheritance; a vested right, like any other property. Let us see if this is not the fact.

But before this is done, a reference will be made to acts in the early history of Massachusetts which are on the record.

There is a grant of a ferry for twenty-one years.

"At generall corte held at Boston, 7th day of 8th month, 1641. It is ordered, that they, that put boats between Cape Ann and Annisquam, shall have liberty to take sufficient toale, as the court shall think meete."

Is this the grant merely of a path across the river? So, also, there is a grant of an inheritance in a ferry, on condition that it shall be submitted to the general court. This grant is cotemporaneous with the grant of the ferry over Charles river.

"At a general corte of election at Boston, the 10th of the 3d month, A. 1648.

"Upon certain information given to this generall corte, that there is no fferry kept upon Naponset ryver, between Dorchester

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and Braintree, whereby all that are to pass that way, are forced to head the river, to the great prejudice of townes that are in those partes, and that there appears no man that will keepe it, unlesse he be accommodated with house, land, and a boate, at the charge of the country: It is therefore ordered, by the authority of this corte, that Mr. John Glover shall, and hereby hath, full power given him, either to grant it to any person, or persons, for the tearme of seaven yeares, so it be not any way chargeable to the country, or else to take it himselfe and his heires, as his own inheritance forever; provided that it be kept in such a place, and at such a price, as may be most convenient for the country, and pleasant to the general courte."

In the record there is a copy of a grant of a bridge over Charles river, near Watertown; the terms of which are that on the condition of making the bridge the tolls are granted forever. This was in 1670.

This is the early statute law of Massachusetts. The later acts of the legislature are of the same character. The instances of such legislation were cited from 7 Pick. Rep. 446, 447, 448, 511, 521, 523. In all these cases, the judges hold the common law of England as to ferries to be the law of Massachusetts; and that a ferry is an indefeasible interest, and a franchise and property.

Mr. Webster then stated a number of cases, in which, when a bridge had been erected in the place of an existing ferry, compensation had been made to the owners of the ferry. He insisted that upon these authorities a ferry was as much a property, as much the object of legal protection, as any thing known to the laws of the land.

The plaintiffs obtained their property as a purchase of some extent up and down the river. It is not required now to determine how far the purchase extended; for the rival bridge erected by the defendants, is alongside of the Charles River Bridge, and is an interruption to the profits derived from it. It is not necessary now to fix the limits of the franchise. That the interference is direct and certain is not denied. Difficulties may arise hereafter in fixing these limits, but it is not necessary to go to a distance to establish them before a certain and admitted interference shall be examined.

It is submitted that in London no bridge has been erected over the river without compensation having been made to those whose interests may have been injured. The evidence of this will be found in many works on the subject. Those treatises show the minute attention of the British parliament, in all cases in which private rights may be affected by the enactment of a statute. All persons who may be interested have notice from parliament of the application; and compensation is made where any injury is done.

It is said that the distinguished honor of maintaining principles which will arrest the progress of public improvements, is left to the plaintiffs in this case. This is not so. All that is asked is that the franchise shall be protected. Massachusetts has not made any improvement of her own, although she has subscribed liberally to those which have been undertaken by individuals and corporations. In all these cases, private rights have been respected; and except in the case now before the Court, Massachusetts has kept her faith. Recent and previous acts by her legislature show this. In every case, but this, compensation has been made in the law, or provided for.

The plaintiffs do not seek to interrupt the progress of improvements, but they ask to stay revolution; a revolution against the foundations on which property rests; a revolution which is attempted on the allegation of monopoly: we resist the clamor against legislative acts which have vested rights in individuals on principles of equal justice to the state, and to those who hold those rights under the provisions of the law.

It is true that before the legislature the rights of the plaintiffs were examined, and still the Warren Bridge charter was given; but the decision of a committee of the legislature was not a judicial action. The plaintiffs have a full right to come before this Court, notwithstanding their failure before the legislature.

In reply to some remarks of the counsel of the defendants, Mr. Webster stated, that the proceedings in England under writs of *ad quod damnum* did not affect private rights. The writ of *ad quod damnum* issued for the honor of the king.

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It issues before a grant is made, and for the protection of the king. Private persons may claim the protection of the law in favor of their rights, notwithstanding such a proceeding. Questions of nuisance, are always questions of fact, and must be tried by a jury; but no jury can assess the amount of injury until the facts are ascertained. These principles are sustained in 3 Black. Com. 219.

Is it the liberal construction of charters to interpret them against the rights of individuals, against the enactments of the law? The course has been to construe them in favor of the grantees, and to enlarge their provisions for his benefit. The whole of the course is changed if an opposite principle is adopted. But the plaintiffs ask no more than a fair judicial construction of the law; no more is required but what they are entitled to under a judicial interpretation of it.

It has been said, in the argument for the defendants, that although the holder of a franchise may maintain an action against a stranger who interferes with it, without a license; yet he may not against one who has a license from the state. This is without authority. If he can claim against a stranger, it is because of his property in the franchise, and this will protect him in proceeding against any one. This right is complete against all, and the state can give no privilege to interfere with it.

In the case of *Bonaparte v. The Camden and Amboy Rail Road Company*, Mr. Justice Baldwin, sitting in the circuit court of New Jersey, says:

“The privilege of exemption of the principal is not communicated to the agent, though the principal is a state which cannot be sued at law or in equity; and the agent, a public officer acting in execution of the law of the state, and the subject matter of the suit was money actually in their treasury, in the custody of the defendant for the use of the state.” 1 Bald. Rep. 217.

The proprietors of the Charles River Bridge purchased the ferry franchise from Harvard college, and it became their property for the purpose of erecting a bridge upon its site, with all the rights and advantages to be derived from it. It was purchased, and the consideration for it was the annual

payment of the sum of two hundred pounds. This, by the charter, was to be absolutely paid; and no accident to the bridge, no deficiency of tolls, will excuse the non-payment of the sum so stipulated to be paid.

Suppose, while the bridge was building it had been profitable to use the ferry, would not the tolls have belonged to the proprietors of the Charles River Bridge? There is no ground to suppose the college meant to retain any thing out of the franchise. Nothing appears, which will authorize the supposition that the state meant to take a transfer of the franchise, or any part of it; and allowed the use of it to the bridge, to the extent of putting up the abutments, at the places where the ferry was carried on. The bridge is the successor of the college, in the franchise; the company purchased it, to its full extent, and the state, by the charter, ratified the purchase.

The erection of the bridge was an undertaking of great hazard, and the result of the effort to construct it, was considered exceedingly doubtful. It cannot, therefore, be supposed that the franchise was to be diminished, and its enjoyment to be limited. Nothing of this is expressed, and nothing so unreasonable can be implied. It is in evidence, on the record, that the college was a party to the building of the bridge. The president stated that the college had assented to it. According to the course of decisions in Massachusetts, the franchise was an indefeasible inheritance. In that state, the management of ferries was with the general court. As to this franchise, from 1640, to 1785, it was respected by the local authorities of Middlesex, and Sussex. It would then appear that it was held under a legislative grant, which transcended all other rights.

The franchise which was obtained from the college, was not extinguished by compact: and it cannot, therefore, be disturbed by any action of the legislature.

It is deemed important, and is the truth of the case, to consider the rights of the Charles River Bridge Company, in connection with those of the college. The college had, and still have, an interest in it; and the use of the franchise by the company is essential to all the purposes and to more than those for which it was held by the college. The pontage

furnished by the bridge, was the substitute for the passage by the ferry; and it was not, therefore, only for location at the place where the bridge was built, that the rights of the college were obtained. All the privileges enjoyed as a part of the ferry franchise were acquired. When the bridge was put up on the same place as the ferry had been, and for all the ends of the ferry, it is but just and reasonable, that the extent of the right shall be in the hands of the Bridge Company, equal to that which it was when held by the college.

The views which have been taken, fully show that the state of Massachusetts made, in the full and rightful exercise of her legislative powers, a grant to the proprietors of the Charles River Bridge, and the grant was a contract. As such, by no subsequent legislation, could it be impaired: a right vested, cannot be divested. Cited 2 Dall. 297, 304; 9 Cranch, 52; *Green v. Biddle*, 8 Wheat. 1; *Fletcher v. Peck*, 6 Cranch, 136.

If a power of revocation existed, it was no contract. The state cannot make such a contract; as the power of revocation is incompetent to will the existence of a contract.

Can a stronger case be imagined, than that which gave rise to the controversy in *Fletcher v. Peck*? The contract had been made in fraud; in morals, it was just to burn it; in policy, it was equally so, as a large part of the domain of the state of Georgia was granted for no adequate consideration. But this Court decided in that case, that the legislature of Georgia had no power to annul the grant; and the grant was maintained by the judgment of this Court.

The difficulty in which this case is involved, and upon which the defendants expect success, arises from considering two things alike, which are different, — the power of making public grants, because the interests of the community requires they should be made, and the right of eminent domain.

Where property is taken for public purposes, compensation is given; this is the exercise of eminent domain. The legislature are not the judges of the extent of their powers; and the question now before the Court is, whether they had the power which has been exercised in this particular case.

By the act of the legislature authorizing the Warren Bridge,

two injuries were done to the plaintiffs. First, by the damage they sustained from a rival bridge. Secondly, the infringement of their right of pontage. The toll had been originally granted for forty years, and this excluded rivalship. By the interruption of the receipt of their full tolls, the proprietors of the bridge sustained heavy losses; and by the erection of the Warren Bridge, now a free bridge, their beneficial right of pontage has been destroyed. In these, have the contract of the state of Massachusetts been broken. Thus the case is entirely within the provision of the constitution of the United States.

What is the meaning of the assertion, that in a grant by a government nothing passes by implication? How is it in grants of land? Does a patent from the United States carry less than a grant by an individual? They are the same—a grant of “land” carries “*mines*.” The principle, that nothing passes by implication, arose in early times, when the grants of the crown were greater than now; when they were made to favorites, and the power was abused;—and when their extravagance induced courts to restrain them to their words. Hence the insertion of “*mero motu*” “*certa scientia*.” Hence the principle, that the grant of one thing shall not carry another. The doctrine that nothing can be carried by implication in a royal grant, does not apply to grants by parliament, or of franchises; 2 H. Bl. 500: no case but one from 2 Barnwell and Alderson’s Reports, 792, has been cited to sustain the position. That case is not authority here. But if the whole of that case is taken together, it is in favor of the plaintiffs in this cause. The decision is right; although there is too much strictness in some of the opinions of Lord Tenterden.

Franchises are complex in their nature, and all that may be necessary for their enjoyment must pass with them, although things separate do not pass; whatever is incident to them, does not require implication to pass such incidents. Thus the grant of the ferry to the college, gave the right to take toll; to keep boats: cited 1 Nott and M’Cord, 393.

It has been said that this may be good law as to individuals but that it will not operate in the case of a state.

Authorities for this position are required. If a grantee of a franchise can sustain an action against an individual, for an injury to his property, or an interference with his property, why may he not against the grantee of the government, who thus interposes? The case is stronger against the government, than against a stranger. The government has received the consideration for the grant, and there is an implied obligation to protect the enjoyment of it.

Ferries are property. They may be seized for rent; they may be devised by will; they may be sold: and yet it is said the government may take them away from their proprietors, for their grantors. Let us see some principle which will allow such property to be taken; and which yet regards private property, and respects private rights, and public faith.

The right of a ferry carries tolls; and it also carries, for its protection, the principles of justice and of law, that the grantee may keep down injurious competition. It is vain to give him one without the other. Both must be given, or none is given. The grant is intended as a benefit, as a remuneration for risks, and for advances of capital, not as a mere name. The ordinary means of compensation for such advances are not sufficient. The franchise necessarily implies exclusive and beneficial privileges.

It was under this law of ferries the plaintiffs took their charter. They considered that under it they held the whole extent of the ferry franchise. There was then but one ferry between Charlestown and Boston. It had the whole ferry rights, and this they acquired; this they have paid for. If a grant refers to another grant, it carries all which is contained in both. But suppose there had been no reference to any other; it would carry the same rights, and to the same extent, or more. The expense of erecting a bridge, and keeping it in order, is much greater than that attending the setting up and keeping in order a ferry.

The promotion of public accommodation is no reason for taking away a privilege, held under a legal grant. It cannot be done unjustly to the rights of others. These rights must be respected. The income derived from these rights shall

not be diminished. Suppose the bridge had been erected without an act of the legislature to authorize it; would a subsequent act protect it? How can a grant to A be lawfully impaired, or injuriously affected by a subsequent grant to B, which interferes with the enjoyment of the prior grant? Once granted, always granted.

What position would a judicial tribunal assume that would construe a grant differently, according to the parties to it. Can you raise an implication against it, and not do so against the government? Implication is construction — construction is meaning — and when a thing is in the deed, it is the meaning, and force, and purpose of the instrument. If the parties are changed, these cannot be changed. To allow another bridge to be built, was to take away the tolls of the first bridge. In support of the position, that this was a violation of the rights of the plaintiffs, the opinions of all the judges of the court of Massachusetts, from which the case is brought, are appealed to. They all say, that the charter granted by the legislature is binding on it, and cannot be impaired; and they say, that, to whatever extent the grant goes, it must be supported; 2 Mass. Rep. 146. But the Warren Bridge does impair the charter, for it takes away the tolls. What then becomes of the reserved rights of the legislature? This is a solemn adjudication of the court of Massachusetts. Then there is no reservation.

There is implication in government grants. This has been so held in Massachusetts; 4 Mass. Rep. 522. It is also the law of this Court; Dartmouth College Case, 4 Cond. Rep. 549.

The court below held, in this case, that whatever was granted belonged to the grantee; that the ferry at Charlestown was granted to the college, and that the law of England relating to ferries prevails in Massachusetts; that nothing can be taken for public use without compensation; that public grants are always to be so construed as to convey what is essential to the enjoyment of the thing granted, and cannot be superseded, or the grant impaired. In support of these positions, Mr. Webster read parts of the opinions of the judges of the superior court of Massachusetts, delivered in this case.

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The proposition is stated, that grants of the character of this which is held by the plaintiffs contain a power of revocation. This cannot be. Being grants, they cannot be treated or considered as mere laws; being grants, they are contracts. In this case, the grant was intended to be beneficial to the grantees, and it contained a covenant that it should continue for forty, and afterwards for seventy years. For this a consideration was paid, and is now paid; to the public, by the large expenditure for constructing the bridge; to Harvard College, by the sum of two hundred pounds annually. But the legislature have now done every thing to make the grant unproductive; to deprive the holders of all advantage from it.

Necessarily, the grant to the proprietors of the Charles River Bridge contained a guarantee of their enjoyment of the privileges contained in it. Any other construction would be against every principle upon which the rights of property, derived from public acts, rests. Suppose, after the grant of a ferry, with a right to take tolls, and the establishment of it by the grantee, at the expense of boats, a free ferry had been erected at the same place, or so contiguous as to destroy the profits of the first ferry, by a ruinous competition; would this be proper? It is said that still the right to take tolls remains in the first franchise. This is true; and it is then inquired, what injury has been done? No franchise, it is said, is taken away; all the rights granted remain; the tolls remain.

It is true, the counsel for the defendants admit that all will pass over the free ferry; but yet they say the toll dish of the first grantees is not touched by the hands of those who have opened the free ferry; the notice of the rates of tolls to be paid, yet remains.

But to all this the plaintiffs oppose the simple fact. Under the plaintiffs grant of a franchise, they possess the constitutional right to keep down all competition, during the whole time of the charter.

This has been established by an unbroken chain of authorities, for many years; and this applies to all grants alike, here, as well as in England. It is a franchise; and every dollar of toll taken at the Warren Bridge, since its erection, and the temporary use as a toll bridge, is a part of the legal and

proper profits of our franchise; and thus the guarantee, conveyed in grant, (as guarantees are interpreted by the Massachusetts courts,) has been broken.

Mr. Webster then went into a further examination of the argument of the counsel for the defendants, and into a notice of the observations which had fallen from them in the defence.

The plaintiffs, it is said, have received compensation enough; their profits have been already very large; they have had a reasonable compensation. This is not so. Nothing is reasonable but the fulfilment of the contract. It is not reasonable that one party should judge for themselves, as to compensation; and depart from the terms of the contract, which is definite and plain in its meaning.

There was no extinction, it is argued, of the franchise. The answer is, that the act authorizing the second bridge expressly extends the charter, adding thirty years to it; and recites the consideration the public had received for the same. In this there is a guarantee that the state shall pass no law to impair the contract. It is not true that we can have no property in the line of travel, if by that is meant, in the franchise granted by Gov. Winthrop and others, the right of transporting passengers from Boston to Charlestown. The franchise is valuable, because the transportation was concentrated at the points at which the plaintiffs' bridge was erected.

The construction of the grant to us, which we demand, it is said, is not valuable. The plaintiffs say otherwise, and the issue is with this Court.

It is held up as a cause of alarm that the plaintiffs claim a perpetual right to this franchise; and that when the charter of their bridge has expired, they will fall back upon their claim to the ferry. We do no such thing. When that time comes, it becomes the property of the state again. Theirs then it is, "King, Cawdor, Glamis, all!" And it were to have been wished that the defendants could have been content to wait until that time had arrived.

The analogies of the rights of a tavern, a street, a mill, &c., have been put in the course of the argument for the defence. But all these were false analogies. They were not franchises; not in the grant of the government.

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Then there is a long argument, based on the alleged policy of Massachusetts, in regard to public highways. There is nothing, Mr. Webster argued, in the situation of such matters, in that state, requiring the adoption of any particular line of policy. The roads are numerous and excellent; and no trouble is experienced in maintaining them so. There are no cases requiring any peculiar policy, nor any great or broad power to be exercised over them.

This particular case formed an exception to the usual caution exercised by Massachusetts, in legislating upon matters of this kind. Ever since this act passed, nay, within these two years, the legislature has granted a charter to a company for the erection of "The Hancock Free Bridge," near the West Boston bridge, from Boston to Cambridge; between that avenue and Canal bridge, lower down. The act prescribes the width; the obligation to attend the draw, &c.; makes the bridge a free one; the corporation to keep it in order, &c. For all this, they look for their compensation in the advanced value of their contiguous property. And in this very act, that corporation are directed to make compensation to all owners of real estate, whose property is liable to injury by the erection of the said bridge; appraisers are to be appointed according to a mode pointed out in the act, and if not made according to their appraisement, then by the decision of a jury of the country. And a section of the act provides that its provisions are to be void, if, before a certain period, the proprietors of the West Boston bridge shall sell out their bridge, according to the estimate of appraisers to be appointed by the parties. The language is, if such proprietors, "will sell out their bridge and franchise." Now, can this be set off by metes and bounds, as required of us, in relation to our "franchise?" And so much for the "policy" and understanding of the legislature of Massachusetts, as to franchises!

Again, it is pretended and argued, that the plaintiffs have not always been uniform in the interpretation of their own rights. On the contrary, answered Mr. Webster, this same right was set up on building the bridge to the franchise of the ferry, and was then acknowledged: and the same prin-

ciple has ever since been recognised and acted upon, by the legislature, and by the plaintiffs.

And there was one other subject, which, though it had no bearing upon the case at bar whatever, had been made a great deal of, in the argument of defendants' counsel. Some observations upon it had been advanced, by way of connecting it with the case, of so novel a kind, as to require, however, some notice. And this was, that in chartering the Warren Bridge, the legislature did but exercise its power over the eminent domain of the state. This power is described as being inalienable, and that the state cannot abandon it; nor by its own covenant, or grant, bind itself to alienate or transfer it in any way. That it cannot tie up its hands in any wise, in regard to its eminent domain.

In the course of the arguments for the defendants, one of their honors (Mr. Justice Story), had put a case to the learned counsel (Mr. Greenleaf), like the following: Suppose a railroad corporation receive a charter at the hands of the state of Massachusetts, in which an express provision was inserted, that no other road should be granted during the duration of the charter, within ten miles of the proposed road. The road is built and opened. Did he hold, that, notwithstanding that covenant, a subsequent legislature had the power to grant another road, within five rods of the first, without any compensation, other than the faith, thus given by their charter, of the state of Massachusetts? And the learned counsel had replied, that he did so say, and did so hold! This struck him, as it must have struck the Court, as most startling doctrine.

[Mr. Greenleaf here stated, that in such a case, the faith of the state of Massachusetts was pledged to indemnify the parties; by making full compensation for whatever property the state might take, and for all the injury which should be done to private rights. It would not be presumed by this Court, that the faith of the state would be broken.]

Mr. Webster proceeded to say, that the first question he wished to put, in relation to the position of the defendants' counsel, was, how can this power of eminent domain, as thus

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construed, be limited to the two sides, merely, of the road? Why should it not fall upon the road itself, and no compensation follow to the grantees? It is all alike part and parcel of the same "eminent domain." And so, in the case at bar, if that power gives the right to erect another bridge beside our own, why does it not give an equal right to take the latter, also?

Eminent domain is a part of sovereignty, and resides in the sovereign—in the people; what portion of it is granted to the legislature, belongs to them; and what is not granted, remains with the people. Is not the power of eminent domain as well restricted as any other power? It is restricted by the constitution of the state, which contains a surrender of it to the government erected by that constitution. It may be as well regulated and restrained by provisions in the constitution, as any other power originally in the people; and its exercise must be according to such provisions.

It is necessary to have a clear idea of what this same power of eminent domain actually is. What then do the counsel for the defendants mean, when they say that the state cannot transfer its eminent domain? They certainly do not mean its domains, its territory, its lands? And here he cited the case of the government land in the west and northwest, as a proof that that could not be the meaning of the counsel. They were the eminent domain in one sense, of the country; and in that sense the government can, and does pass them away. But the other sense was, the power, rule, dominion of the state over its territory. These two ideas must not be blended in this investigation. The power of the state over its eminent domain, means the power of government over property, public or private, under various rules and qualifications. What is meant by the government's inability to part with its eminent domain? It can part with the thing, and reserve the power over it, to the extent of those qualifications already adverted to. Taking public or private property for public benefit, by the state, is an exercise of the power of the state over its eminent domain. But granting a franchise is not an exercise of that power; Cited Vattel, page 173, sec. 244; page 70, sec. 45.

The legislature may grant franchises. This is done by its sovereign power. What may it do with those franchises? What power has it over them after they have been granted? It may do just what it is limited to do, and nothing more. It is restrained by the same instrument which gave it existence from doing more.

The question is, what restrictions on this power are found in the constitution of Massachusetts: and by a reference to it, the limitation of legislative powers will be found. The power may be exercised by taking property, on paying for it. In the constitution it is expressly declared, that property shall not be taken by the public without its being paid for.

In Baldwin's Circuit Court Reports, it is said, that it is incident to the sovereignty of every government, that it may take private property for public use; but the obligation to make compensation is concomitant with the right; *Bonaparte v. The Camden and Amboy Rail Road Company*, 1 Baldwin's Rep. 220.

How then can this ground, which has been taken for the defendants be maintained? The whole pleadings show that the right of eminent domain was not involved in this case, when before the court of Massachusetts. It is too late now to present it. There is no allegation that the property of the plaintiffs has been taken, and compensation made for it.

The defendants seem to say, that if the property of the proprietors of the Charles River Bridge has been taken under the right of eminent domain, the case is without a remedy. But this is denied. The taking under the privilege of eminent domain, is limited by the provision; that compensation shall be made. Nor is it true, that the legislature may not part with a portion of its right of eminent domain. Thus, in *Wilson's case*, the right to tax lands in the state of New Jersey, was surrendered by the legislature. *The State of New Jersey v. Wilson*, 7 Cranch Rep. 164; 2 Peters' Con. Rep. 457.

In conclusion, Mr. Webster said, the plaintiffs have placed their reliance upon the precedents and authority established by this honorable Court, in the course of the last thirty years, in support of that constitution which secured individ-

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ual property against legislative assumption: and that they now asked the enlightened conscience of this tribunal, if they have not succeeded in sustaining their complaint upon legal and constitutional grounds: if not, they must, as good citizens of this republic, remain satisfied with the decision of the Court.

Argument in Charles River Bridge v. Warren Bridge

MASSACHUSETTS SUPREME COURT, 1829.¹

The question before the Court is now to be discussed and settled upon strict principle applicable to private rights. The case is now where reason is to govern, and not declamation. Legislatures do not act under the same responsibility as judges. They may determine by simple ayes and noes; but a judge must give reasons for his decision. It may not be improper to advert to general considerations of expediency, but they cannot have very great influence. The defendants talk of a free course of legislation, of free competition, as the source of public improvements. They would not, I trust, compete with us for our franchise. But how are public improvements promoted among us, except by private funds advanced upon a confidence reposed in the most delicate and strict observance of public faith? Nothing is done here by the government itself, but every thing by individuals, under the sanction of the government; and the defendants would bring their liberal doctrines into conflict with rights thus established. I rejoice in an opportunity to resist the attempt to force these popular notions upon courts of justice.

¹ Richard Peters, who reported the case of the Charles River Bridge v. Warren Bridge, in the United States Supreme Court, stated in a note that Mr. Webster's argument was not fully reported. His earlier argument in the Massachusetts Supreme Court, having been fully and satisfactorily given in 7 Pickering, pp. 427-443, it is here appended to the later argument in the United States Supreme Court. See also the argument of Messrs. Webster and Shaw in the same case, 7 Pickering, pp. 365-367, and their joint argument in an earlier stage of the case, upon the equity jurisdiction of the Massachusetts court in cases of this character, reported in 6 Pickering, pp. 383-389.

The plaintiffs have a bridge, at which they receive toll ; the defendants place another bridge by the side of it and take two thirds of the toll ; and the question is, whether this is an invasion of private rights. If the new bridge is not protected by the act of 1827, we say it is a nuisance at common law ; if it is so protected, then we say that that act is contrary to the constitutions of this State and of the United States.

Before considering these great questions, it may be well to dispose of some subordinate collateral matters.

The plaintiffs must be an existing corporation in order to maintain this suit. The defendants say, that the original charter of the plaintiffs has expired, and that there has been no acceptance of the extension allowed by the act of 1791. The objection admits of several answers. First, if the plaintiffs are not a corporation, it should have been pleaded in abatement. Secondly, the defendants' own charter recognises the plaintiffs as a corporation. And thirdly, the plaintiffs *have* accepted the extension of their charter. If an act of incorporation is granted to individuals, organizing themselves under it is an acceptance of it ; and if an additional act is passed, anything done in conformity to it, which they could not have done without it, is an acceptance of the additional act. The plaintiffs have continued to act as a corporation ; which is conclusive evidence of such acceptance. But it is said we ought to have accepted sooner. What then ? It may be matter to be tried on a *quo warranto*, if the Commonwealth see fit to institute such process ; but it does not concern the defendants. Before the expiration of the first act, the second was expressly accepted by a vote ; and why was not this in season ? Further, the plaintiffs acted in a manner irreconcilable with the non-acceptance of the act, by discontinuing to take the double toll. It is objected however, that this was not until the West Boston bridge had been built. Witnesses in speaking of a transaction which took place more than thirty years ago, would naturally refer to something visible to fix the time ; but we believe that the plaintiffs discontinued the double toll immediately after the passing of the act, though they did not make the entry of the act on their books till 1802. Besides, the provision on this subject was not a condition precedent. Grants which are beneficial to a corporation, are pre-

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sumed to be accepted. *United States Bank v. Dandridge*, 12 Wheat. 70. The act in question, so far as the plaintiffs' assent to it could be of any avail, was beneficial to them. If they had had the power, they would have rejected the whole act; but that they could not do, and the extension of their charter for thirty years was a benefit.

The defendants say, that the ferry was not a ferry by prescription. We have merely called it an ancient ferry. But whether it was by prescription or by grant, the law in regard to it is the same.

It is objected that the college have never assented to the act of 1791. They have received the annuity provided for by the act, and this is an assent. But their assent was not necessary. Their whole right to the ferry had been relinquished in 1785, and the question in 1792 was between the government and the plaintiffs only.

Other cases of questionable legislation have been enumerated on the part of the defendants. It is a very usual course for a man in fault, to resort to similar instances for his justification. There is a natural alliance between bad principle and bad practice. But the Court are not told of the ninety-nine cases in the hundred, in which the legislature have been sedulously attentive to the preservation of private rights.

First, it is said that if our construction of our charter is correct, the grant of West Boston bridge was a flagrant violation of our rights. Suppose it was so; we complain now of a more flagrant violation. Is a former remote encroachment to justify an immediate and direct encroachment? Forbearance in a questionable case does not affect the right. If the legislature did wrong in granting the West Boston bridge, they at the same time conferred a benefit in the extension of our charter, which furnished a sufficient reason for our acquiescence.

The counsel say, that in 1792, a committee of the legislature made a report, which was accepted, giving the negative to our claim to an exclusive right. The report is of no authority, —but what does it amount to? That the act of 1784 “is not an exclusive grant of the right to build over the waters of Charles river.” If the plaintiffs misconceived their rights, it does not follow that they have no rights. We do not now set

up the claim which was made in 1792; our present claim and the report may well stand together.

The erection of Canal bridge too, it is said, was, according to our principles, a violation of our rights, and yet we did not resist. Possibly the proprietors of Charles River bridge thought the interference was rather with West Boston bridge; and the division between that bridge and Canal bridge, of the burden of the college annuity, favors the idea. It is however sufficient to remark, that if in a doubtful case the plaintiffs did not think it would be advantageous for them to contend, it does not conclude them in the present case.

In regard to Malden bridge, the Penny ferry seems to have belonged to the town of Charlestown, and the inhabitants may have considered that their interest would be advanced by having it superseded by the bridge. And when this bridge was afterward injured by the grant of Chelsea bridge, it was provided in the act, upon the agreement of the parties, that a portion of the profits of Chelsea bridge should be paid to the proprietors of Malden bridge. But it is objected that no compensation was made to the owner of Winnesimet ferry for the damage occasioned by Chelsea bridge. It may be remarked in answer, that the bridge was between Chelsea and Charlestown, and the ferry was over an arm of the sea from Chelsea to a third town at a considerable distance from the bridge.

In the case of the free bridge to South Boston there was no memorial in behalf of the proprietors of the old South Boston bridge, and a majority in interest were in favor of the erection of the new bridge.

The two turnpike roads from Watertown to the Mill-dam and West Boston bridge, were both granted in the same year, and it was a race between the parties, which should get a road first.

But none of these instances furnish authority for a court of law.

Much has been said about odious monopolies. Is a bridge, a ferry, a fair, or a market, a monopoly? The statute of James has not swept *them* away. A monopoly is a grant of a benefit without any burden. Viner says, that a ferry or a bridge is not a monopoly, because there is a duty to be per-

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formed by the proprietor. Doubtless our predecessors, the Indians, had the perfect freedom of competition which the defendants now want to introduce; but they had no bridges, no ferries. All the public improvements in the country have arisen from what the defendants call monopoly; from a grant by the public, of security for private funds, for the benefit of using them. We are asked if our ancestors would have granted to the college a right over the whole river. Undoubtedly they would; and if they had foreseen the increase of population in the vicinity, with their anxious desire to encourage learning, they would have done it the more willingly.

We come now to the consideration of the real questions in the case.

The first question is, whether the college had any ferry-right in 1785;—whether by one or all of the previous grants, or by usage only is immaterial.

A ferry having been previously established between Boston and Charlestown, in 1640, the general court say, “the ferry between Boston and Charlestown is granted to the college.” These words would be sufficient now to pass a ferry; and at that period, it was not usual to be more full and formal in making grants. A ferry will pass by any words which show such an intent. 1 Nott & M'Cord, 393. The defendants say that this was a gratuity to the college. It may have been a gratuity, but it was not revocable. A gift executed is beyond the power of the legislature. This grant has been recognised by the government in 1650, 1654, 1710, 1712, 1781, and 1785. The act of 1781 (*St.* 1780, *c.* 42) regulating the ferry, imposes a heavy penalty on the college in case of negligence; and yet the defendants say the college were subject to no burden. The statute proceeds upon the ground, that the college were liable to indictment, if the ferry were not properly kept. The power of even regulating the tolls is recognised by that statute to be in the college; and yet it is said they had no franchise. In *St.* 1784, *c.* 53, § 5, “a reasonable and annual compensation for the annual income of the ferry” is saved to the college, after the bridge shall become the property of the Commonwealth. Is this a gratuity, or is it an express acknowledgment of a pre-existing right, and a compensation for

the relinquishment of that right? All these acts are confirmations of the grant, and yet it is argued, that they prove that the college had no right at all. As well may it be contended, that the several ratifications of *magna charta* abrogated it.

It has been objected, that the college could not take under the grant, not being a corporation until 1650. That may have been the reason then why a confirmation was made.

It is urged that the government have constantly interfered in regard to the ferry. But they took none of the revenue, nor ever resumed the franchise; all their acts were merely regulation.

The defendants distinguished between a grant of the franchise and of the profits and revenues. But the distinction does not aid them. All that the government could grant to an individual was the benefit. There is nothing beneficial in a ferry except the tolls, the revenue; and a grant of the revenue carries with it an obligation to support the ferry. The government did not sustain this ferry; they built no boats, they merely regulated them; they derived no profit from the tolls. The actual management and revenue have always been with the college. If using the whole franchise for a hundred and forty years, does not give a title, it will be difficult to know who in this country has a title.

Next, what is the extent of the ferry or franchise, up and down the river? It is sufficient for us to show that it is broad enough to cover the place where the defendants have built their bridge, and that so the bridge would have been a nuisance to the ferry.

The grant was of a ferry between Boston and Charlestown; and this in legal contemplation takes the whole of the two termini. It covers the whole water between these two towns. Suppose that no ferry or bridge had subsisted between these towns, and an individual should to-day purchase of the government "the ferry between Boston and Charlestown": how would the grant be interpreted? It must either include the whole water between Boston and Charlestown, or it has no limits. Would the Court hold that the same prerogative could to-morrow grant another ferry by the side of it? The case is analogous to that of a market. If a market on the *same*

day is set up too near an ancient market, it is by intendment of law a nuisance, but if on another day, whether nuisance or not is a question of evidence. So a ferry established between the *same termini*, is by intendment of law a nuisance.

It is clear law, that it is a nuisance to set up a ferry so near another as to draw away the toll. This doctrine, the defendants say, is traced to a single dictum in the Year Books. That would only prove that it was too plain to admit of dispute. But it rests on other authority. The case in Hardres, as reversed by Hale, acknowledges the law as above stated; and it is recognised by Brooke, Rolle, Comyns, Blackstone, Kent, and the court in South Carolina.

Where a thing is granted, all that is necessary to the enjoyment of it goes with it. If an office is granted by name, all the powers, duties and fees belonging to it pass. So of a ferry. If an individual grants a ferry, all his rights accompany it; and it is settled, that the right of a ferry, in local extent, is exclusive, so far as to put down injurious competition. How does the grant to the college in 1640 carry the beneficial part, the tolls? They are not mentioned in the grant; but it has not been pretended that the college took only the privilege to row and scull. The law says, that the right to toll goes with the ferry by implication; but it says so no more than it does that in like manner passes the right to put down injurious competition. Both are equally incidents to a ferry. The profits of this ferry were originally £40; why is it not contended that the government might have taken all the excess afterwards, on the ground that they did not intend to give more than that sum? If they may take back a part of what is granted by implication only, they may the whole.

The defendants however contend, that it can be made out by authority, that the ferry is limited to the landing-places, and a case in Saville is referred to as overturning the doctrine of Kent and others before named. The question there was, whether the owner of a ferry had any right to the water, except to navigate it. We contend for no other right. "A ferry is in respect to the landing-places," means only that there must be a place to land. Com. Dig. Piscary, B.

The grant in 1640 was not a ferry *de novo*, but of a fran-

chise already in exercise. What were its rights at that time? History shows that it was the sole ferry between Boston and Charlestown, and that it was in the hands of a lessee of the government at a rent of £40 a year. Could the government have granted another ferry between these towns, to be used before the lease to Converse had expired? The lease gave him "the ferry between Boston and Charlestown, to have the sole transporting of passengers and cattle from one side to the other."

If this were doubtful, are we to forget that there has been a long continued usage showing the extent of the grant? No rival ferry was attempted to be set up during the space of one hundred and forty-five years. In *Blankley v. Winstanley*, 3 T. R. 279, a usage under a charter is considered as the true exposition of the extent of the charter, and it is there held to override a by-law. In 1785, the college, if they had not assented to the erection of Charles River bridge, might have sued the plaintiffs, and their charter would not have protected them. *Chadwick v. Haverhill Bridge*, 2 Dane's Abr. 686. In *Tripp v. Frank*, 4 T. R. 668, it is conceded, that if it had been the duty of the plaintiffs to transport all passengers from Kingston upon Hull, to Barrow, as well as to Barton, they would have been entitled to all the tolls. So here, we are obliged to transport all passengers between Boston and Charlestown, the termini of our ferry, and our rights are commensurate with our duties.

Next; if the college had, in 1785, the right of the ferry to the extent above claimed, we are to consider what was the character of the transaction which took place in that year. It is entitled to receive a reasonable construction; such as will protect the parties to it, and carry their intent into effect.

The petitioners for a bridge could not erect one without the consent of the college, as it would have been a nuisance to the ferry; the college had no authority to build one to the obstruction of the navigable waters, as it would have been a usurpation against the government, and the government had not the power to take away the ferry-tolls from the college. There were three parties then, neither of which could alone erect the bridge. The petitioners therefore were obliged to

obtain from the government a license to obstruct the navigable waters, and from the college, a right to take the toll. Under these circumstances the act of 1784 was passed. The college were a party to the act; that is, they assented to it. A subsequent ratification implies a previous assent. It was not necessary that they should be named as a party in the act itself. They stop their ferry-boats, and accept of the annuity provided for them by way of compensation. This was a ratification, and, in connection with the act, was a conveyance of their right in the franchise, to the plaintiffs for the term of forty years, and to the government ever afterwards. The conveyance was founded on a consideration, in respect both to the college and the Commonwealth; an annuity being granted to the one, and a public benefit conferred on the other, at the plaintiffs' expense. It has been said that the annuity was payable out of the tolls, and so the consideration proceeded from the public. On the contrary, the act makes it an absolute charge on the plaintiffs, and it must be paid even if their bridge should in any way be destroyed or rendered unproductive. We admit that there is no assignment in the forms of the common law; but the transaction is not to be looked at in a technical view; the intent of the parties is to be regarded. It is a case of substitution of one person to another as owner of the ferry, through an act of the legislature, which is binding on all persons who assent to it. The transaction may be considered as a purchase and surrender of the ferry to the use of the plaintiffs for forty years, with a reversion to the government, the plaintiffs paying the college an annuity of £200 during the term, and the government making a reasonable compensation afterward for what would have been the income of the ferry.

The case in *Palmer*, 78, is in point. If the legislature had said "whereas the college have a ferry, now leave is granted to them to build a bridge," the bridge would have the same extent of right as the ferry. It would be merely substituting one mode of transportation for another; like sail-boats for row-boats. So that the plaintiffs, holding the right of the college, have the same extent of franchise, as if the college had been authorized to substitute a bridge for their ferry.

But we need not rely on the ground of a transfer of the

ferry. We stand upon a grant from the legislature; and if necessary, the Court will refer to the ferry, or suppose that our charter refers to it, as descriptive of the extent of the grant.

We say that the recent act, incorporating the proprietors of Warren bridge, impairs the rights vested in us by our charter. Our property is taken from us, without any suitable provision for compensation.

It is unnecessary to argue that an act of the legislature, impairing the obligation of a contract, is unconstitutional; or that a grant is a contract. The whole ground is covered by the cases of *Vanhorne's Lessee v. Dorrance*, *Fletcher v. Peck*, *New Jersey v. Wilson* and *Dartmouth College v. Woodward*. This last was the case of a charity for public objects, and it was argued that the government might therefore control it; but the answer was, that the plaintiffs were a private corporation, though for the benefit of the public. The franchise now in question is granted to a private civil corporation; not to a public corporation over which the legislature have a control. In 4 Wheat. 669, in speaking of canal, bridge and turnpike corporations, Story, J., says, "In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so indeed as if the franchises were vested in a single person." Any notion, therefore, which may be entertained, that the grant of our bridge is connected with the public benefit, is of no consequence. The question concerns a franchise. We contend that the late act is a resumption of a part of a franchise, and all argument about a free course of legislation is irrelevant; it is a question of right.

The same rule of construction prevails in a question between the government and their grantee, as between individuals. In a case of contract, they stand on equal ground. The rule as to grants of the crown being construed in favor of the crown, is explained in the *Dartmouth College* case. If on the solicitation of a party, a grant is made injurious to the crown, it is considered that the king was deceived; and hence the practice of inserting the words *mero motu* in crown grants, in order to entitle the grantee to a more liberal construction. But the application of the rule to parliamentary grants, was questioned by Eyre, C. J., in *Boulton v. Bull*, 2 H. Bl. 500. Ours is a

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grant of that sort. And besides, the English rule was never adopted in this Commonwealth.

The plaintiffs being a private corporation, from the nature of the case, our grant must be exclusive to some extent; and this is a question of construction. The charter allows the erection of a bridge "in the place where the ferry between Boston and Charlestown is now kept." The plain implication is, that the bridge was to be a substitute for the ferry. Had the words been "in place of," that is, expressly as a substitute, they would not have been stronger. "Where the ferry is kept," is descriptive of the franchise. It is immaterial whether we do or do not make out a privity between the proprietors of the ferry and those of the bridge. Without such privity, the act authorizing the erection of a bridge in the place where a ferry is kept, gives the same local extent. Our grant either has no extent beyond the width of our bridge, or it has the common law extent, of keeping down injurious competition, or it has the same extent as the old ferry. If we can go a single foot beyond our planks, there can be no question in this case. All the arguments showing that a ferry generally, or this one in particular, is exclusive to a certain extent, apply equally to the bridge, indeed with greater force, because a greater outlay of capital was necessary in the case of the bridge, and greater risk was incurred.

Assuming what seems to be admitted, that if the defendants were acting merely as individuals, without any license from the legislature, they would be liable to us in an action for a nuisance, (and yet if we cannot go beyond the length of our planks, it should seem to be doubtful,) the question is, whether the legislature could authorize them to build their bridge. In our view, if an action would have lain, it is impossible to maintain that an act of the legislature can protect the defendants. By no construction can it take from the plaintiffs any right which they could before have enforced.

It is admitted that this franchise is private property, and that the Warren bridge takes two-thirds of our income. The whole effect of the recent act is to take the fruits and profits of the franchise; for it is clear, that it does not resume the license to obstruct navigation. It is a mere question of money be-

tween the treasurer of the Commonwealth, and the proprietors of Charles River bridge. As soon as the proprietors of the Warren bridge shall be reimbursed their expenses, the tolls received at that bridge go to the government. The legislature put their hands into our toll-dish and take the lion's part. They in effect say, this is a day of free competition, and we will enter into competition with you for the money in your till. If there were no constitution, such an act could have no force.

The legislature cannot grant what they do not possess. The confusion in this case arises from considering these acts of the legislature as laws; whereas they are grants, which are wholly different. A law is a rule prescribed for the government of the subject; a grant is a donation. In laws, the last in order of time repeals the first; in grants, the first stands unaffected by the last. Every grant supposes that the grantor has parted with his right, and that he will not reassert it. The question then is, whether the defendants are protected by their act of incorporation in doing what they have done; if they are not, their bridge may be abated. We say that a right to build and maintain a bridge for the time stated, with a right to keep down contiguous and injurious competition, has been granted to us; and if the legislature meant to grant to the defendants a franchise within those limits, they have attempted to grant what they had before granted to us. If our franchise does not extend above the supposed franchise of the defendants, we have no ground of complaint. The case of *Jackson v. Catlin*, 2 Johns. R. 248 and 8 Johns. R. 406, establishes the principle, that the terms used in a legislative grant, must, as in other grants, be construed with reference to the power of the grantor, and must be considered as not granting what the legislature had not to grant.

But it is said that in England, after a writ of *ad quod damnum* executed, a grant of a second market &c. will be valid, and that as we have no such process, a second grant without such a writ will be sustained. [C. J. Or rather that the course of proceedings before our legislature is equivalent to an *ad quod damnum*.] An *ad quod damnum* is a *judicial* process, by which inquiry is made upon the oath of honest and

lawful men, whether setting up a market &c. will be to the damage of the king or others, and if to the damage, then to what damage. There is nothing of this sort before a committee of the legislature. By the constitution, the legislature cannot exercise judicial powers. We have a better protection. The jury is our *ad quod damnum*. We have usually in our acts a provision for indemnity to persons injured, and for a trial by jury: and this is the course now generally pursued in England. It has been decided, that a legislative act appropriating private property to public uses, is void, unless it contains a provision for a simultaneous compensation. This Court have preceded, and the Court in New York have followed, in establishing this principle; and the reason is, that there is no security in legislative justice, but by holding such acts to be void. The inquiry by the legislature, the supposed *ad quod damnum* which is to settle our right, is by the party who are to derive a benefit from stripping us of our rights. The legislature cannot go further than to say that a measure will be of public convenience and necessity; if they are to determine that it will not prejudice private rights, and such decision is to be conclusive, the provision in the constitution is nugatory and inoperative.

But the counsel mistake in regard to the English law of *ad quod damnum*. A grant after the execution of such a writ, is not conclusive of the right of the grantee. *Mosley v. Walker*, 7 Barn. & Cressw. 41, and *Mosley v. Chadwick*, *ibid.* 47, note; Hale *De Portibus Maris*, in Hargr. Tr. 59. But it is proper that such a writ should be issued, in order that the king may not act without apparent reason. He would not intentionally grant what does not belong to him, and thereby put the true proprietor to his action. But the doctrine is made clear by the provision for a *scire facias*, at the suit of the party, to repeal the second patent, where the same thing has been granted to two patentees. If a *scire facias* will be issued in such case, *a fortiori* will an action lie while the second patent remains unrepealed.

But however this may be, it is plain, that the legislature of Massachusetts cannot make a grant which shall be conclusive of the right of the grantee. By the constitution, on a question

of property, every subject has a right to a trial by jury; and if so, how can a hearing before a committee of the legislature be supposed to be conclusive? The defendants say that our property has not been taken; that what we call property is not property. We have a right to a judicial trial of that question.

Then is property taken by the government from the plaintiffs by the late act? The constitution does not say *land*, or *real estate* or *personal estate*, but it uses the most general word, *property*. Is a franchise property? The sum of 20,000 dollars a year is taken from the plaintiffs. Is this property? If the defendants had taken this without a license from the legislature, it is admitted that we should have had a right of action; and for what? For property. It is said on the other side, that our property is not taken, but that our complaint arises from a justifiable use of the public's property, and that our loss is *damnum absque injuriâ*. Not so. Suppose our franchise, to the extent which we claim, had been limited by monuments on the banks of the river, and the legislature, reciting a public exigency for another bridge, should thereupon authorize a bridge within those limits; would it not be appropriating our franchise in whole or in part? And if so, it is an appropriation of property. They take our franchise, and the proceeds of our franchise. Both are property. The franchise may descend or be conveyed, and in other respects has the incidents of property. The provision in the constitution as to taking private property for public use, is to be construed liberally, or at least fairly for the subject. Our franchise is clearly taken by the recent act. Is it not appropriated to the public use? If not, the legislature had no right to take it all.

But further, we contend that the power of the legislature to pass such an act as the one in question, is taken away by the constitution of the United States.

A grant is admitted to be a contract. The defendants say our charter is a mere license to build a bridge. Be it so; a license is a contract. Our grant, or license, is for a valuable consideration; for services to be rendered. It operates as a covenant for quiet enjoyment.

As the legislature could not make a grant inconsistent with a previous grant, the defendants must say either that our franchise

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does not extend beyond the planks of our bridge, or that the legislature retained a tacit right to resume their grant. There is no evidence of such a reservation. Suppose our limits up and down the river had been defined; could the legislature, upon any tacit reservation or supposed public exigency, have granted other bridges within those limits? It will not be asserted. And yet in fact such limits are fixed. The words of the grant, by necessary implication, limit the distance to which our franchise shall reach; and if not, the law settles the extent. If the tolls of a ferry or bridge are not fixed by the grant, the grantee may take reasonable tolls. So there must be a reasonable construction as to the extent of the franchise. The law says, a rival ferry or bridge shall not be set up so near as to take away the custom. And this too is to be construed reasonably. If we have any exclusive right beyond our planks, it must cover the place where the new bridge is erected. The direct and necessary effect of the new bridge is to take away our custom, construing these terms most favorably for the defendants.

There would be more reason to contend, as a matter of public necessity, that our bridge should be removed as obstructing navigation, than that our money should be taken. But whatever might be the plea of necessity in that case, the right of navigation, the peculiar right of the government, is not resumed; while our money, the fruits of our franchise, which could in no way be affected by the public exigencies, is taken from us. It is said our doctrine would obstruct public improvements. That we deny. If another bridge was wanted, it might have been had, without involving the necessity of taking away our revenue. The government might have built it at our expense, and let us take the tolls.

The question of public necessity requiring another bridge, is not now open. We deny the fact, and we deny the competency of this Court to try the question of convenience, or the effect of it if proved. Public necessity is apt to be public feeling, and on this rock we are in danger of making shipwreck of the bill of rights. In *Martin v. Commonwealth*, 1 Mass. R. 357, Parsons says, that prerogative is more dangerous in a popular government than in a monarchy; that in England, it is the

cause of one against the whole, here it is the cause of all against one; and therefore here it is of more importance that judicial courts should watch the claim of prerogative more strictly. In *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. R. 109, which was the case of a turnpike road, Chancellor Kent lays out of view all considerations of public convenience or necessity, "as altogether inapplicable to the question of right." In *Mosley v. Walker*, 7 Barn. & Cressw. 52, Lord Tenterden says, "If the ancient market has been held in the public street, can we say that because population and commerce have increased, and that a greater number of carriages pass through the street in modern times than passed in ancient times, the lord, therefore, is to lose his franchise?" We take private property for public use more freely in this country than would be tolerated in England. We take it even for speculation.

In regard to the compensation provided for in the act of 1827, it is to be made to any person or corporation whose *real estate* shall be taken by the defendants. The word *property*, which is the constitutional word, is said to have been excluded *ex industria*; at any rate, it is not in the statute. On examining the precedents of private acts in England, in similar cases, it will be found, that in regard to indemnity to persons whose rights are affected they embrace every species of interest.

But it is contended on the other side, that the legislature have not taken away any right belonging to us. On what ground then do they require the Warren bridge to pay half of the annuity to the college? Why make those proprietors pay our debts, if they have not taken our property? It would be difficult to find in the history of our legislation an act like this. The legislature acknowledge, on the face of the act, that our right is taken, and they undertake to debar us from a trial by jury and to judge themselves of the compensation to be made to us. They direct the annual sum of £100 to be paid for us, and they take from us the annual sum of 20,000 dollars.

In case the Court shall think that our rights are invaded, it will not be necessary to destroy the new bridge. The decision need not run against the public convenience. The bridge may be allowed to stand, as the legislature have given their consent to the obstruction of navigation, and the Court can adjudge

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the defendants to be our trustees. Such a decree would perhaps lead to an agreement between the parties.

Some general remarks have been made, to show the solicitude of courts not to overturn a legislative act unless its unconstitutionality is manifest. Certainly if a judge has doubts, they will weigh in favor of the act. But it should be considered, that all cases of this sort will involve some doubt; for it is not to be supposed that the legislature will pass an act which is palpably unconstitutional. The correct ground is this, that the Court shall interfere and declare an act to be void, where the case, which may have been doubtful, shall be made out to be clear by examination. Besides, members of the legislature sometimes vote for a law, of the constitutionality of which they are in doubt, upon the consideration that the question may be determined by the judiciary power. This act of 1827 was passed in the house of representatives by a majority of five or six votes. We could show, if it were proper, that more than six members voted for it because the unconstitutionality of it *was* doubtful; leaving it to this Court to determine the question. Now if the legislature are to pass a law because its unconstitutionality is doubtful, and the judge is to hold it valid because its unconstitutionality is doubtful, in what a predicament is the citizen placed. The legislature pass it *de bene esse*; if the question is not met here and decided upon principle, then the responsibility rests nowhere, and the constitutional provision for annulling an act, instead of a shield, is a sword. It is the privilege of an American judge to decide on constitutional questions. It has raised the dignity of the judicial station. Without entertaining an ill opinion of legislative bodies, it is no disparagement of them to say, that judicial tribunals are the only ones suitable for the investigation of difficult questions of private right.

Title to Land on the Mississippi

FEBRUARY 14, 1837.¹

ON the first day of August, 1796, James Clamorgan, a merchant residing at St. Louis, addressed a petition to Charles Dehault Delassus, at that time the Spanish Lieutenant Governor of New Madrid and its dependencies, (including what is now part of Missouri and part of Arkansas) praying for a concession or grant of land. The petition sets forth that the petitioner had been encouraged by the Governor-General of Louisiana, at that time the Baron de Carondelet to undertake to establish a rope manufactory for the use of his Majesty's navy, and to bring farmers from Canada to teach the cultivation of hemp; that the petitioner was obliged, beforehand, to secure a title, which would guaranty to him the title of a quantity of land, proportionate to his views, in order to make an extensive establishment, so soon as circumstances should favor the undertaking; the political state of things existing at that time, being such as to oppose the obtaining of farmers from Canada, but the petitioner hoping to be able to obtain them in times more peaceable:

He therefore solicits the grant of the following described tract of land, viz.: "the tract of land which lies on the western side of the River Mississippi, beginning at the place which is opposite the head of an island, situated at about one hundred arpens below the Little Prairie, which lies at the distance of about thirty miles below the village of New Madrid, in descending the current, and continuing to descend it until one is placed (on the same western side) right opposite the outlet commonly known under the name of river à *Carbono*, the mouth of which is on the

¹ From a pamphlet in the Library of Congress entitled "Title Papers of the Clamorgan Grant of 536,904 Arpens of Alluvial Land in Missouri and Arkansas. Washington: Printed by Gales & Seaton, 1837." Mr. Webster rendered the opinion as counsel for W. A. Bradley and others, proprietors of the Clamorgan Grant, previous to the land being offered for public sale.

eastern side of the Mississippi; so that, from the said place, situated as aforesaid, opposite the mouth of the above-mentioned river à *Carbono*, a line be drawn, running toward the southwest or thereabout, said line shall be drawn parallel to the one which is to be drawn from the place situated opposite the head of the island, lying, as hereabove stated, at about one hundred arpens¹ below the said Little Prairie; these two said lines shall run in the depth, in a southwestern direction or thereabout, and shall be the boundaries of each of those two opposite sides, until the extremities of the said two lines be sufficiently prolonged in the said direction, so as to reach the banks of the branches of the river St. Francis the most distant from the Mississippi, which banks (of said branches) of river St. Francis shall be the boundary and limit to the third side of the land demanded; and the banks of the Mississippi shall be the fourth side of the same, to begin from the head of the aforesaid island of the Little Prairie, and descending the current, on the western side, until the place situated opposite the said river, called river à *Carbono*," to the end that he may select and improve, within said tract, the land most suitable for the cultivation of hemp, the whole not being capable of improvement, a large part being overflowed by ponds and impracticable low swamps; but the petitioner to enjoy the whole tract, and dispose of the same forever, as property belonging to him, his heirs and assigns, with power to convey the said land, or any part thereof, to whomsoever he may see fit.

On the ninth day of the same August, the Lieutenant Governor, Delassus, issued his grant, or concession to the petitioner, reciting that the petitioner's statement had been examined, that he was satisfied as to his means and ability for carrying on the undertaking, and that the province would derive benefit therefrom; and paying due attention to the recommendation of the Baron de Carondelet, the Governor General of the province, he proceeds to declare that he grants the tract asked for, to the petitioner and his heirs, in the place

¹ The arpen (or arpent) as a measure for land is still used in Louisiana and in the province of Quebec. It contained one hundred square perches, varying with the different values of the perch from about an acre and a quarter to about five-sixths of an acre.

and under the terms asked for, provided the grant be not prejudicial to any other person; the grantee to have the land surveyed, but not being compelled to survey it immediately, the extent being so considerable that the survey would incur a great expense; but when the expected farmers from Canada should arrive, the land to be surveyed, in order that the grantee might obtain from the Gov. Gen. regular confirmation of his title.

The continuance of hostilities between Spain and England prevented Clamorgan from obtaining his farmers from Canada, and commencing the cultivation of hemp, until the whole province of Louisiana was transferred, first by Spain to France, and afterwards by France to the United States; so that it was impracticable for him to comply with the conditions, or to fulfil the public objects of the grant. No subsequent confirmation of the title was ever obtained from the Governor General, and no attempt ever made by him, or any other Spanish authority, to re-annex the land to the royal domain, either for want of compliance with the conditions, or any other cause.

Clamorgan caused the land to be surveyed in 1806, and the grant and survey to be recorded, according to the provisions of the act of Congress of March 3d, 1805.

Clamorgan, on the 12th day of May, in the year 1809, conveyed the tract, by regular deed, duly executed and recorded, to Pierre Chouteau.

A petition was filed in this claim, in the District Court of Missouri, against the United States, under the provisions of the Act of Congress of the 26th May, 1824, but was abandoned in consequence of the decision of that court rejecting the claims of Soulard, and several other claimants, on the general ground that the Lieutenant Governors, under the Spanish authority, were not authorized to make grants of land. This decision was of course conclusive, so far as that court was concerned, on the claim founded on Clamorgan's grant. All further prosecution of the claim, therefore, in that court, was abandoned; and the same course was adopted in regard to very many other claims, founded, in like manner, on grants made by the Lieutenant Governors.

The decision of the District Court, however, was brought up to the Supreme Court of the United States, and there

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reversed; the Supreme Court being of the opinion that the Lieutenant Governors were authorized by the laws, customs and usages of Spain, to make grants of land.

The first decision of the Supreme Court, on any of these claims, reversing the judgment of the District Court, on the ground above mentioned, was pronounced January term, 1835.

By this time the period limited for bringing suits by petition, against the United States, in the District of Missouri, had long since expired, having been limited by the act of May 24, 1828, to the 26th of May, 1830.

On the 9th of July, 1832, Congress passed an act for the final adjustment of private land claims in Missouri, appointing a board of commissioners and making it their duty to examine all unconfirmed claims, filed in the recorder's office according to law, founded upon any incomplete grant, concession, award, or order of survey, issued by the authority of France or Spain, prior to March 10, 1804.

This act originally limited the time for presenting claims, to twelve months; it was extended by the act of 2^d March, 1833, to two years from the date of the said act, and has not been longer continued in force.

On the claims presented to it, the board was to decide, and report its decisions to Congress. Before this board were presented many or all the cases which had been abandoned in the District Court in consequence of the decision in that court, in the cases of Soulard, Delassus and others; and among the rest, this grant to Clamorgan was presented.

Several of these claims were allowed by the Commissioners, and have since been confirmed by act of Congress; but the present claim was disallowed by the board, on the 26th of August, 1835, "the board being unanimously of opinion that it ought not to be confirmed, the conditions not having been complied with."

Opinion.

I entertain no doubt of the legal validity of this grant. Cases have been recently decided by the Supreme Court, upon rights asserted under the treaty with Spain of the 22nd of Feb., 1819,

for the cession of Florida, and that with France of the 10th of April, 1803, for the cession of Louisiana, which appear to me to settle, conclusively, all the material points connected with it.

By the first-mentioned treaty, Spain ceded to the United States the Territories of East and West Florida, the adjacent islands dependent thereon, and all public lots, squares, vacant lands, public edifices, fortifications, barracks, and other buildings, *which are not private property*; and in the 8th article, it is stipulated that all grants made before the 24th of January, 1818, by the King, or his lawful authorities, *shall be ratified and confirmed to the persons in possession of the lands.*

The treaty with France for the cession of Louisiana, declares, in the 2^d article, that the cession shall include all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices, *which are not private property*, and in the 3rd article, that the inhabitants of the ceded Territory shall be incorporated into the Union as soon as possible, and admitted *to all the rights of citizens of the United States*; and in the meantime shall be maintained in the free enjoyment of their liberty, *property*, and the religion which they profess.

These several stipulations have been the subject of laborious and careful judicial consideration. Rights claimed under them have been brought before the Supreme Court, and fully established by its judgment.

That Court has decided that, by these treaties, the United States acquired no right to lands to which individuals had previously obtained title, *whether that title was perfect or imperfect, complete or inchoate*; that grants or concessions from the former Government, are to be construed in their broadest sense, so as to comprehend all lawful acts which transfer a right of property, whether perfect or imperfect; that an inchoate or imperfect right to land, is *property*, protected by the treaties; capable of being alienated, and subject to debts, and to be held as sacred and inviolable as other property; that the clauses of confirmation, in the treaty with Spain, operate presently and immediately on the ratification of the treaty, requiring no future or subsequent confirmation by Congress; that these claims confer titles to the persons in *possession* of the lands, and that

this possession does not mean actual occupation, but only that legal seisin which the owner or grantee of lands is presumed to have, whenever there is not an actual adverse possession.

The Court has decided also, that according to the laws and usages of Spain, the Lieutenant Governors of provinces had authority to make grants or concessions of land, and have confirmed grants made by such Lieutenant Governors in many cases. The commissioners have also reported many grants for confirmation, made by Delassus as Lieutenant Governor, and Congress has confirmed those grants.

With respect to the non-performance of conditions, the point on which the commissioners rejected this claim, the Court have said that in all the cases which have come before them they have seen no evidence of the resumption of a grant, by the Spanish authorities, or attempt to make a second grant of the same land on account of failure in performance of conditions; nor does any law of Congress intimate any policy or purpose, on the part of the United States, as successor to the Spanish Government, to enter for condition broken, on any lands granted, *bona fide*, by the Spanish authorities. But however this might be, when the conditions were practicable, and might have been performed, the Court has expressly decided that the grant is good, although the conditions be not complied with, if the conditions became impracticable or nugatory, by the act of the grantor, the transfer of the Territory, the change of government, manners, habits, customs, laws, religions, or political relations. These decisions would seem conclusive, on the general validity of this grant. It may be satisfactory, however, to quote a part of the judgment of the Court, in its own words, in the case of Delassus, the first of the Missouri cases in which judgment was delivered.

The opinion was unanimous, so far as appears, and was delivered by Chief Justice Marshall. Having cited the articles of the treaty of 1803, to which I have already referred, the Chief Justice says :

“They extend to all property, until Louisiana shall become a member of the Union; into which the inhabitants are to be incorporated as soon as possible, ‘and admitted to all the rights, advantages, and immunities of citizens of the United States.’ That the

perfect inviolability and security of property is among these rights, all will assert and maintain.

"The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to lands is property.

"Independent of treaty stipulations, this right would be held sacred. The sovereign who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals, to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change."

It may, perhaps, be suggested, that the rights of the grantee, or those claiming under him, are defeated, or divested, or barred, or in some other way injuriously affected, by the fifth and seventh sections of the act of Congress of 1824, before referred to, for adjusting land claims in Missouri. The fifth section of that act is in these words:

"And be it further enacted, That any claim to lands, tenements, or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts, within two years from the passing of this act, or which, after being brought before said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law, and equity; and no other action at common law, or proceeding in equity, shall ever, thereafter, be sustained in any court whatever, in relation to said claims."

The seventh section is in these words:

"And be it further enacted, That in each and every case in which any claim, tried under the provisions of this act, shall be finally decided against the claimant; and in each and every case in which any claim, cognizable under the terms of this act, shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall, forthwith, be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district."

I cannot think that any thing contained in these sections can have the effect of divesting a vested right, or otherwise injuri-

ously affecting it. These provisions may be valid, so far as they apply to the special and peculiar jurisdiction created by the act. Congress, by that act, consented that the United States should be sued; and it possessed the power, doubtless, in granting this consent, to qualify or modify it, by any conditions which it saw fit to annex. Thus the right of trial by jury is not secured to parties who may elect to proceed before this tribunal. Yet no one will contend that Congress can take away the common right of jury trial from any citizen in cases affecting property. All the common tribunals, where trial exists, are still open to him. The truth would seem to be, that, when this act was passed, an opinion prevailed that these grants were of no value, till confirmed by Congress. When these cases were first brought to the consideration of the Supreme Court, in 1830, they were argued at large, but held under advisement until the Court should obtain such information as would enable it to distinguish between such cases as were founded on contract with the Government or its agents, and those which were still dependent on the pleasure of persons in power, and might be rejected, without violation of good faith.

The act of 1824 evidently proceeds on the ground, as is quite apparent from the first section that there was no fixed right until Congress should confirm the claim. It seems to have been supposed that those stipulations of the treaty with Spain, which respect the confirmation of grants, were promises only on the part of Government, that they acted only on the good faith of the Government, and amounted to no more than an undertaking *that it would confirm such grants*. But the Supreme Court has since decided, after repeated argument and much consideration, that this is not the true construction of the provisions of the treaty. It has adjudged that grants to individuals, made *bona fide*, and in the regular way, whether perfect or imperfect, complete or incomplete, are *property*; that the treaty, *proprio vigore*, confirmed the grants, without the necessity of any further act or proceeding whatever on the part of Government; that individual rights became thus completely vested, and were thenceforward to be regarded as *property*, and held as sacred as any other property. And though the clause respecting the confirming of grants is not found in

the treaty with France, yet, as has been seen already, the Court deems the provisions which that treaty does actually contain, to be entirely equivalent, and equally available for the protection of grants, whether perfect or imperfect. Titles obtained under such grants are adjudged to constitute *vested rights of property*, entitled to all the immunities belonging to any other property.

If this be so, it is quite clear that property thus vested could not be divested by any effect which can be justly ascribed to the operation of these sections in the act of May, 1824.

This view of the case is strengthened by the consideration that Congress does not appear subsequently to have regarded these provisions as barring any right, legal or equitable. The law of 1832, making further provisions for claims of this character, makes no exceptions. It extends to all cases, and makes no intimation of any opinion, on the part of Congress, that any of the claims were barred, or were to be excluded; and when the commissioners, acting under the law of 1832, allowed claims, which in respect to the law of 1824 stand on precisely the same ground as this, and reported them for confirmation, Congress confirmed them, without hesitation or qualification. And, in regard to the tract contained in this grant, the Government of the United States has not taken possession of it, nor sold it, nor surveyed it, nor exercised over it any act of ownership, whatever. These facts are strong indications of the light in which Congress has viewed the provisions of the fifth and seventh sections of the act of May, 1824.

I am of opinion, therefore, on the whole, that the grant to Clamorgan is valid; that the title claimed under it is fixed by the treaty, and is indefeasible; that the decisions of the Supreme Court have established and sanctioned the grounds on which it rests; and that there is nothing in any act of Congress which can bar or preclude it.

DANIEL WEBSTER.

I have examined and concur in the above opinion.

T. EWING.

Argument on Behalf of the Boston and Lowell Railroad Company

JANUARY 20, 1845.¹

THE Committee having been called to order by the Chairman, the Hon. Linus Child, Mr. Webster said :

Mr. Chairman, there are pending before the Legislature, and now before your Committee, two several petitions, both praying for acts of incorporation for the purpose of making Railroads, and both purporting to ask for power to make such roads between the city of Lowell, in the county of Middlesex, and the town of Andover in the adjoining county.

I appear to oppose one of these, — the petition of William Livingston and others — both upon public and upon private grounds: both because there is no exigency or necessity for the road prayed for, and because, if such a road should be established, it would be in violation of the chartered rights of the Boston and Lowell Railroad Corporation.

In regard to the other petition, — that of Hobart Clark and others, — I appear only to suggest that there appears to me to be and that there is, no public exigency, no clear necessity for the construction of such a road, such as would warrant the Legislature in granting the charter for which the petitioners pray. This is a question for the general discretion of your Committee and of the Legislature to decide. Those whom I represent, do not feel that they are liable to much injury from a road from Lowell to the South Parish of

¹ "Argument of Hon. Daniel Webster on Behalf of the Boston and Lowell R. R. Company, at a Hearing on the Petitions of William Livingston and others, and Hobart Clark and others, before the Railroad Committee of the Massachusetts Legislature, Boston, January XX. MDCCCXLV. Reported by Nathan Hale, Jr., Boston, Dutton and Wentworth, Printers, 1845."

Andover, and the public question may well be left to the decision of the Committee and the Legislature.

As to the other, — the petition of Livingston and others, — we come here to resist it on grounds of right. We oppose it as a plain and manifest infringement of the rights of the Lowell Railroad, and the rights of Corporations generally. In this case we are nobody's supplicants; we ask no favor, we desire no indulgence. We stand upon constitutional rights and legal provisions; upon a contract made with the Commonwealth, upon the strength of which we have expended our money; — and under the constitution of this State and of the United States, under the laws of this Commonwealth, and the charter granted to us by it, we come to solicit nobody, to implore nobody, but to assert plainly our rights under that charter, those laws and the rights of property, and to oppose every body and whomsoever may seek to invalidate or infringe them.

Let me begin by presenting in as few words as possible, the general outline of the question. The charter of the Lowell Railroad was obtained among the earliest in this State, in 1830, at a time when Lowell was but just beginning to exist, when any Railroad was but little more than an experiment here, and its construction was a laborious and uncertain undertaking. There was no alacrity in filling up its subscription paper, and there was great difficulty in procuring funds as the work went on. It was not until 1835, that the road was completed and opened. The road extends over a distance of twenty-six miles; the usual time of running this distance is from an hour to an hour and twenty minutes, according to the nature of the service; circumstances have induced the Corporation to establish two tracks over the whole length of the road; its present charge is 75 cents for a passenger, and from \$1.25 to \$1.50 a ton for freight, from one end of the road to the other. There is no complaint against the general conduct and management of the road; it is said by nobody that there is any unnecessary delay or inconvenience, or that the public is not perfectly well served, according to these rates, by the road as it has been constructed and managed. And yet it is quite evident from all that we see and hear, that there is an

attempt making, — I am sure that it will be a quite unsuccessful one, — to raise a cry against this Lowell Railroad as a monopoly, and as I am admonished by the “points” of the learned counsel for the petitioners, this is to be made a ground of violating its charter. It is one wholly unworthy of the regard of the Legislature or of this Committee.

Now that this corporation and all other railroad corporations are in one sense “monopolies,” may be of course admitted. Railroads are a species of property that can be used only by their owners and proprietors; now that long trains and locomotive power upon them are universal, any other use would be wholly impracticable. They can only be used by their owners, and in that sense they are undoubtedly “monopolies.” They are so in the same sense as is a patent right for a new invention, which gives to a man an exclusive right of using that which is his own, — and in no other sense.

I have said that there is an attempt to prejudice, by this cry of “monopoly,” those who are in possession of these rights, by a new set of projectors. I notice the following paragraph on this subject in one of the papers:

“There is not a little excitement in Lowell and its vicinity in reference to the two routes proposed for a Railroad thence to South Andover. One of the proposed roads is to connect with the Nashua and Concord Railroads, and the other terminates on the easterly side of Lowell. The difference between these rival schemes is in fact a dependence upon and connection with the Lowell Railroad by one party, and the entire independence of any such influence or control by the other. A revival of the outcry about vested rights, which had the effect of propelling through both houses a bill to charter the Maine Railroad Extension with more than Railroad speed, is to be made in reference to this branch from Andover to Lowell.” — [Boston Post, Dec. 31, 1844. Financial article.]

The respectable editor of this paper may find time among his other avocations, — the collection of news and the strife of politics, — to pen a paragraph like this; but I think it would have been more in accordance with truth had it been labelled, “inserted by desire.” It has an odor of direct interest or of interested agency. It has a bad odor of mean and

servile authorship about it. It appears to have been done to excite prejudice against men because they form a corporation with which other projectors wish to interfere. It has a bad odor about it.

It was said by the learned counsel for the petitioners in his opening remarks, that the Lowell Railroad had shown great favor to the rich manufacturing companies of Lowell, and that they transported goods and merchandise on factory account, cheaper than they do on individual account. There is not one word of truth in this statement. You have been furnished with the exact rates upon which all charges are made. The factories are great customers of the Railroad, and they transact one part of the business of transportation for themselves, which in other cases the Railroad has to transact. For this an allowance is made to them; but for the services actually performed by the Railroad,—it is shown by the statements before you,—they pay as much, if not more than as much, as individuals pay. This is matter of evidence. You have had Mr. Storrow before you, and he has testified that no individual or company is charged a farthing more, — for the same services, — than is paid by the Lowell Corporations.

To dispose of another subject with regard to the management of this road, on the general face of it, without going into particulars: We have here a statement of the rates of freight and passenger fare on the Lowell Railroad, compared with the same on other railroads, and it shows that they are on the whole rather less than the average on other roads. Now I hope that some substantial ground for action must be shown, before hardship or injustice be administered to this Corporation. We disclaim all indulgence or favor; we wish this question to be decided as a question of right; and upon our judgment of this right we stand until that judgment shall be revised elsewhere.

Here is a railroad as direct as railroads are usually made, from Boston to Lowell; of twenty-six miles in length, opened in 1835. Another railroad has been built, connected with it according to the policy of the State, and provision has been made for that road to enter this as its principal stem, and to

use it on that part near to Boston, according to the principles of that policy.

Now let us see what is the prayer of these petitioners. The petition of Livingston and his associates asks for leave to construct a railroad from Lowell to Andover, "commencing at some convenient point in the Nashua and Lowell Railroad in the city of Lowell, thence running through Lowell and Tewksbury, passing near the Rev. Mr. Lamson's meeting-house, and the house of Aaron Frost in Tewksbury, and intersecting the Boston and Maine Railroad at some convenient point in the South Parish of Andover." These general statements of the course of the proposed road are rendered particular by the plan before us, submitted by the petitioners. I wish to call the attention of the Committee to these provisions. The road is to begin "at some convenient point on the Nashua Railroad in Lowell," and we learn from the testimony that the intention is to go out of Lowell some eighty rods from the Lowell depot, and there on the line of the Nashua Railroad to commence their railroad. They will thence go through the city of Lowell, passing near the present freight depot of the Boston and Lowell Railroad, crossing all the streets at acute angles, thence across the Concord River, then on towards Andover but not in a direct line, but so as to join the Boston and Maine road about three miles from its junction with the Boston and Maine Extension Railroad at Wilmington.

The other petition, that of Hobart Clark and others, represents that the wants of the city of Lowell require a nearer communication between that city and the town of Andover, and requests that they may have leave to construct a railroad, "commencing in Lowell at or near the Boston and Lowell Railroad, thence crossing the Concord River and running nearly in a straight line, to the central village in Tewksbury, passing near the Rev. Mr. Lamson's meeting-house, thence to the Andover and Tewksbury line, near the house of Aaron Frost, thence by the most convenient route through the southwesterly part of Andover, to connect with the Boston and Maine Railroad at some convenient point near the South Parish meeting-house in Andover.

Both these petitions assert that a new railroad communi-

cation is required between Lowell and Andover, and that is presented as their only object. The road proposed by the Livingston petition, however, does not go directly from Lowell to Andover, but having commenced by going out of Lowell in a northwesterly direction, strikes southwardly, not in the direction of Andover until it joins the Boston and Maine Railroad, when it turns actually back again, and runs to the North to Andover. The road asked for by Clark and others is more direct, and would be all new as far as the South Parish of Andover.

The question now arises, — how is the Lowell road interested in this matter? It is not interested in regard to the latter petition (that of Hobart Clark and others). Whether or not that petition is to be granted is matter of discretion for the Committee and the Legislature, the only question for them to decide being whether there is such an exigency and public demand for this road, as requires the issuing of a charter by which, for this purpose, the property of individuals may be taken under an assessment of value; I shall have something to say upon this matter in the form of suggestion merely. But we oppose the petition of Mr. Livingston directly, for it is nothing but a project for a new railroad from Boston to Lowell. If that is its true and real character it is opposed directly to the 12th section of the charter of the Lowell road which provides that there shall be no other railroad built between these termini for thirty years from the granting of that charter.

If one leaves Boston on the Lowell Railroad, at Wilmington, he is fifteen miles from Boston, eleven miles from Lowell, and eight miles from Andover, and this is at the junction of the Boston and Maine Railroad with the Lowell. If a man at Lowell is bound to Andover, he comes down upon the Lowell Railroad as far as Wilmington, and goes thence to Andover by the other Railroad. The passage is made in about fifty minutes; — being liable to some delay from the non-arrival of the cars in which the second part of the journey is to be made. But the distance is but about nineteen miles. The proposed new routes are about eleven or twelve miles in length to the South Parish in Andover. They would accordingly save a passenger going in that direction about eight miles which he

is now obliged to travel; or, in time, would save him twenty-five minutes at the extreme.

There is another thing apparent from a glance at the map to which I wish to attract the attention of the Committee. The charter of the Lowell Railroad says that within thirty years the Legislature shall establish no other Railroad from Charlestown, Boston, or Cambridge to Lowell, or to within five miles of Lowell. Now the Committee have seen the plan of the road proposed by Mr. Livingston and his associates. Suppose a road were built upon this plan from Lowell until it should meet the Boston and Maine Railroad, and then by the proposed extension of that road should be brought into Boston. The average distance between this new route from Lowell to Boston and that of the present Lowell Railroad does not exceed two and a half miles. There is one point, to be sure, at Ballardsvale, where at the angle which is made by the junction, the two roads would be something more than five miles apart, but upon an average of the whole distance, the two roads reduced to parallelism would not be more than two miles and a half apart, from one terminus to the other. The Boston and Maine Extension Railroad, crossing from Boston from its new depot, keeps along near the Lowell road for about seventeen miles, and then turns off and enters the Boston and Maine about two and a half miles above the Wilmington depot. The road proposed by Mr. Livingston, starting from Lowell near the depot of the Lowell road, is directed towards Boston rather than towards Andover, and is not far distant from the line of that road. It then makes a little turn, before joining the Boston and Maine, so as to be at that point a little more than five miles from the Lowell road. But this does not affect the matter. They would be in fact parallel roads; roads carrying passengers and freight between the same termini at about the same expense; roads in direct and immediate competition. The ground is this: that the Lowell road has a right to all this business as exclusive as language can make it, and that this new road would have all the character of a parallel road, raising a competition destructive to the vested rights of the other. Upon this position very important questions arise.

I may say that the present moment exhibits an era, if not a crisis, in the legislation of Massachusetts. Its duties have become delicate as well as onerous, and are in the highest degree important to the rights of the public; and when the Legislature said that it had reserved the right to amend, to alter and to repeal charters, it took to itself an immense responsibility and assumed even judicial functions. For it will not be pretended at this stage of our history and progress, at this epoch of liberty and civilization, that if a Legislature undertakes to repeal or to amend charters, it can act with less regard to law, to constitutional right or to abstract justice, than a judicature would do. This is a judicature; as much bound by the rules of law, and its precedents, as any supreme bench. A judicature every way respectable, except in one point, and that is, that it is not permanent; except that to fill the places you now fill, and to administer the duties that are now yours, there will be another set of men next year. The law is not to be administered by permanent expositors. All that I say, and the only inference that I draw is, that peculiar, high, and delicate duties are to be to-day performed by this tribunal. I say by this tribunal to-day, for I take it for granted that when a Committee have examined any matter and given its deliberate opinion, the Legislature, unless in a case of open and flagrant wrong, must confirm that opinion and adopt it as its own;—or else there is no security in the world for private rights or private property in this Commonwealth.

It is necessary that we do not deceive ourselves: it would be wrong to deceive others. It is foolish to pretend that an assemblage of two hundred and fifty gentlemen, were they Lord Mansfields or Judge Marshalls, could try a case of private right. Such an assembly never was and never can be capable of such a task. If then the Legislature has taken upon itself the right of revising, of altering, of repealing, charters, most assuredly there is no way for it to arrive at just conclusions so prudent or so proper, as to constitute one of its committees a judicature to hear these matters judicially, and reserving to itself the right of discussion, to confine its decision to that of its own tribunal, deliberately constituted.

I have spoken of vested rights that must be preserved; but there is a cry against vested rights. The contributors to, and partisans of, new works, pushing their own speculations forward, raise an outcry against what they are pleased to call the outcry in favor of vested rights. But what are these vested rights? They are nothing but certain and settled rights; the fee simple to a man's farm or house; his right to the property for which he has paid, which the law guarantees to him, and which no man without violence or fraud can deprive him of. The Commonwealth of Massachusetts has a vast domain in the Eastern country. She is in the habit of making grants of this land, and the purchaser takes and has a valid title to it. For an equal consideration she grants privileges in corporations; who shall say that this grant is not just as sacred as the other? The law, the principles of public life, of private life, all circles of respectability support him who maintains vested rights to be beyond the reach of everything save judicial legislation. We hear too, daily, of "overgrown corporations;" but here, as elsewhere, I must be allowed to declare it to be un-American, or if I may coin a word, un-Massachusetts-like, thus to assert that the poor are against the rich, and the rich intrenched behind corporate privileges. There are undoubtedly many corporations in Massachusetts, and I undertake to say that this is the most remarkable of inventions to make the poor even with the rich. There is no necessary distinction here between poor and rich. Who remain rich? Who remain poor? We have equal laws, going farther than any in the world to maintain an equality of property. We have no law of primogeniture; the inheritance is divided equally among all the children, and everything has been contrived from the beginning, for an easy division of property, an easy alienability of property. If there are many rich men among us whose fathers and grandfathers were rich men, I have not the pleasure of their acquaintance. How did our rich men become rich? What is the amount they hold compared with that which they inherited? You will find that of those called rich when these obnoxious charges are made, their riches are mostly the result of personal exertion. I suppose the sum of \$50,000

would be called wealth—at least it would be in my hard-working profession. If that be a fair ground I suppose that a man with \$50,000 may be called rich. How many in our community are there who have earned this sum in comparison to those who have inherited it? Twenty-nine out of every thirty have earned it! Here is a boy who goes to sea at fifteen years of age, with some little advantages of education from our public schools—for which we may thank our ancestors and the institutions we derive from them—goes before the mast, has some chances or opportunity of learning navigation,—rises to be mate, then master, traverses every sea, the Atlantic perhaps thirty times, ranges the frozen, the Southern, the tropical oceans, comes back with respectable earnings, invests them and sits down to enjoy an old age of leisure. The very first time one of these questions comes up he is marked as a rich man to be considered obnoxious by the poor! He rich; and the rich enemies of the poor! You see other instances of the youth beginning with a hod,—till he can get a trowel and rising to be mason and master mason and acquiring wealth; others winning the same fortunes with the hammer and fore-plane. With industry and enterprise they become independent, and then become as obnoxious as their neighbors who inherited wealth! This is un-American! un-Massachusetts-like! It is altogether against the sense and feeling of our community to join in this outcry against the rich. Interested men get it up, but the majority have far more liberality and love of truth than to give in to such an idle distinction and obnoxious distinction between classes of men.

Who is poor here! I have read of poverty in other nations and in other times. There exist among us, it is true, widows and orphans, the sick, and insane, and aged, but all, more or less, if they are beyond the reach of the common charities of the law, have some pittance for their support,—and where is this deposited? Just in these very Corporations of our Commonwealth, under the protection of the law. They eat and drink their daily morsel only because the law protects this pittance. They would starve if the operation of law or mismanagement should deprive them of it. But to speak of the poor who are healthy and industrious, is to speak a language

not applicable to Massachusetts. No man here is poor who can work. Labor is not poor; it is the great master of all interests in this Commonwealth; bringing capital to its feet; and it shall have my voice to be so forever. We have no poor who have strong hands and strong hearts and resolute purposes to do their duty and maintain their rights.

Now allow me to remind you that there are in this Commonwealth, — how many millions, do you imagine, of capital held under corporate rights or charters? An intelligent friend has given me this statement for which I am willing to vouch:

There are	- \$30,000,000 in Banks,
“ “	- 40,000,000 in Manufacturing Companies,
“ “	- 30,000,000 in Railroad Companies,
“ “	- 10,000,000 in other companies not enumerated,

making \$110,000,000 in all. And this does not include the life insurance companies and many others. So that it would be safe to say that the amount of corporate property in this State approaches nearly to one hundred and fifty millions of dollars. Every one sees that this is a very great proportion of the whole property of the Commonwealth.

The first reflection that strikes one, is, that in a community of the size of ours, such a capital of one hundred and fifty millions, shows a very prosperous and rich state of society. But what I desire more particularly to attract the attention of the Committee to, is the usefulness of these corporations.

In the earlier history of the law and of commerce, associations and corporations obtained a bad character. They were then monopolies. Under the Tudors and Stuarts one of the great grievances complained of was the granting of monopolies by the Crown. But what were these “monopolies”? They were privileges granted to an individual or a number of individuals to do exclusively that which was before open to all the subjects of the realm to do. They were literally exclusive rights to trade in some particular thing. Under Elizabeth and James I., the Turkey and Russia companies were established with the exclusive right to trade with those countries, and to bring into England the commodities which they supplied, shutting out all other subjects. This was the grievance which was amended by the statute against monopolies; but

they came down to us under suspicion and odium, and although corporations are wholly changed, as they exist with us, something of the old prejudice also attaches to them. The corporations which exist here in Massachusetts may be divided into two classes, one of which partakes somewhat of the nature of a monopoly, and in the other of which there is no monopoly at all. One class requires an act of the Legislature under which it may take private property for its use at a valuation, as in the case of turnpike companies, canal companies, railroad companies; the others have only a corporate existence, forming in fact only a sort of partnership.

What has been and is the effect of this last kind of corporations? There is no monopoly in their formation. Any body may manufacture goods; any body else can have a charter that applies for one. Charters are granted by a general law, and any set of men may have one as well as any other. The effect of this on the state of society is in my judgment quite admirable. Property with us has been from the beginning divisible and alienable by simple forms of transfer. Any justice of the peace in the country would make a deed to carry a title to real estate for fifty cents. We have no entails, no primogeniture. Inheritances are equally divided to sons and daughters; while real estate is transferable more easily here than elsewhere. This keeps the titles of property more frequently changing from man to man. Then here is another provision, — I know not by what human sagacity it was reached, — and that is these forms of partnership which we call corporations.

Look at its magical influence! It is but a statute partnership. Each partner has his responsibilities and his rights. It is a statute indenture of co-partnership, while the partnership stock is divided into parts, and these parts by force of law are made transferable at any time by the delivery of scrip in the market. Compare this with the state of things elsewhere! Look at our common corporations. The shares are sometimes made as small as fifty dollars each; the directors look to its concerns; a man may become a partner at pleasure, and sell out at pleasure, according to his necessities, wants, or desire of investment. How is it in England, with a society

for the same purposes? Every partner must have a specified portion of the stock. The whole of it is in the hands of a few holders; a man of small capital cannot partake in it at all; and if any person has a desire to sell his portion, all the partnership accounts must be settled. The settlement of accounts and valuation of stock cannot always be made immediately, and never with facility, and the consequence is, that all the stock for such purposes must be, and is, in the hands of a few rich men.

I dare say that the father of the present premier of England owned as many as twenty manufacturing establishments, each of which here would be carried on for the benefit of as many as a hundred persons. This furnishes business for all; those most able contribute most largely; each one receives in proportion to his contribution; if there is more knowledge and skill acquired by those who contribute most, it all enures as much to the advantage of the smallest shareholder as it does to their own; and if any one will take the trouble to look through all the lists, it will be found that the number of subscribers is very large, containing members from every interest of society, and especially from those of small means. I had occasion not long since to look over the subscription books of the Merrimac Company at Lowell, and I found that the number of shareholders was great, consisting in a large degree of artisans, orphans, administrators, and all those classes of society whom every benevolent man would wish to protect. Where else could they invest their property if it were not for these corporations? In England and France there are large sums in the public funds, the interest of which is paid by government. Here there is little stock of our own State, and that of the United States is transient and fast passing away, and these people are constantly advised that they cannot do better than to place their property in these corporations. And according to my reading and experience, you may go through the whole civilized world and see what has been done to place those who are less rich on an equality with those born rich, and you will find nothing equal to our system of granting charters for manufacturing corporations to all who apply.

Everybody admits that this is a day in which the public

mind is stimulated by a great spirit of enterprise. Now there is no doubt that enterprise deserves encouragement. But all must admit that it is not commendable where it degenerates into a spirit of mere speculation; this must be discouraged by legislatures and by all men. One of the forms in which this spirit now expresses itself, is that of railroads. It is deserving, in proper limits and bounds of encouragement, but this very matter may tend, and is liable to tend, to generate speculation. There is danger that a spirit of private interest unconnected with public improvement may spring up for the sake of creating a stock which may for a time stand high in the market, and enable certain projectors to make profitable bargains. This state of things calls for great discretion and consideration. One part of the principle that is to govern us, is that we must avoid the hasty granting of corporate powers;—the other warns us against the hasty infringement of already granted powers. In other words a general motive or rule of conduct, to be observed in regard to those corporations which require powers to take private property, is, that they should be established with great caution, and only where a clear necessity for them exists; and that when they are granted they are entitled to protection against injurious and destructive competition. There should be caution in granting them, perfect good faith in not infringing them. This maxim should be engraved in bold letters on the first page of the statute book.

And both these cautions are required as well for the public as for individuals. If there is not an essential exigency, if there is not a high demand for the proposed work, all the expense incurred is so much thrown away, so much lost to the community. On the other hand, when rights have been obtained, and money expended under them, and other persons interfere to destroy the profit from the investment, the whole loss is so much lost to the community. These public interests ought therefore to enforce caution independently of private right and the sacredness of the public faith. Railroad corporations, like turnpikes and some others, require the right to take the property of individuals for the purposes of their construction — upon appraisement. I suppose that this is

necessary. The constitution authorizes it, but only with two important conditions and limitations, and I am afraid that sometimes in the desire to support what is convenient, we overlook these restrictions of the constitution. It is not every convenience, or suggestion of convenience, that will enable the public, under them, to take the property of individuals and give it to others at a forced valuation. The language of the constitution is that there must be an "exigency." The 10th Article of the Bill of Rights provides only for the taking of the property of any individual for the public use in the case where "the public exigencies require."

I do not deny that new and enlarged railroad facilities may constitute such an exigency, that a large convenience may constitute such an exigency. But I am quite sure that a railroad from man's house to man's house, from every little village to its neighbor is no such exigency, it is a small and inconsiderable convenience. Will the convenience of three neighbors justify them in taking the rights of the fourth? Certainly the constitution meant no such thing. In regard to modes of conveyance, at the time of the formation of that instrument its application was to common roads; they are made for the public use, and everybody contributes to them, everybody enjoys them. When we get to the construction of turnpikes we advance one step farther, and that a step not free from some doubt. I remember when it was considered deserving of some question, whether it was right to take a man's property for this purpose by force of law. It was urged that this was a private corporation taking the land for its own use, and was not the case of taking individual property for the public use. The objection was answered by the general idea that a turnpike is a public road, although it is to be used in a particular manner, and so the use was considered an equivalent granted to the corporation for the benefit derived from the road. It might be that the road was not to be used by the public, but it was for the public benefit. Then came the case of canals, then that of railroads, and the railroads raised a more difficult question. They were neither public in their construction nor public in their use. No man could ride upon them in his own carriage, and they were essentially

private in their use as well as construction. But railroads were holden as being objects of great public utility and public benefit, and therefore it was decided that the State might take land for their construction itself, from private individuals, on paying for it, or might authorize a corporation so to do; it being considered that the benefits which accrue to the public, the great objects for which the privilege is granted, constitute a public use; and of these benefits and objects the Legislature is the judge.

Now the Committee will see that it is only by slow progress that we have come to this doctrine that holds that the land of a private individual may be taken by a corporation for the sake of building a railroad. A different and opposite doctrine is still held in the neighboring State of New Hampshire. I am not about to justify that doctrine, but I am bound to say that it is not so void of plausible argument in its support as has sometimes been imagined. The other doctrine can only be justified by making "the public use" to mean the same as the "public benefit," and then by saying that if the Legislature does not wish to take the land for this purpose itself, it may authorize a private corporation to take it in its stead. It is only by this quite liberal construction of its power that the Legislature is able to make such grants. I think indeed, that under these progressive changes of the construction of the law, the great alteration in the modes of intercourse, and the new facilities of intercourse to be obtained by means of these grants, constitute a case which authorize the establishment of railroads of large extent, clearly demanded by the wants of the public and of extensive advantage to it; but I do not mean to say that under the present construction, if a man A wishes the privilege of going over the land of his neighbor B to that of C, B can be compelled to give up his land on a forced valuation.

The first requirement for the exercise of this power by the Legislature is a public exigency. Now what is a public exigency? I repeat that it must be in fact and essentially a *public* exigency. No private neighborhood request is sufficient, but the public, in some just acceptance of that term, must be interested in having the proposed improvement made,

or the Legislature has not the power to make the grant. The next requisite is that compensation must be made. This is one of the difficulties arising from the Legislature's delegating its right to take individual property for the public use; for if it takes it itself it is obliged to pay for it or make adequate provision for such payment. I do not mean to say that there is any danger of a failure of compensation here, but this is a case that ought to be provided for. There may be individuals getting an act of incorporation for mere speculative purposes, taking upon themselves the air of representing the Commonwealth. They clothe themselves in the name and authority of the Commonwealth of Massachusetts, proclaim that they are about a great public improvement and must buy their land cheap. The individual must be forced to sell cheap; he must give up his hope of making a profit on the improvement of his property, and yield it up to this corporation which comes with the majesty of the Commonwealth to make its own improvement, at the bare cost. Questions of compensation, however, do not arise at the present stage of these petitions, and I forbear to go into the principles that should govern them.

But then what is the proof in this case of there being any public necessity for these new roads? It cannot be found in the petitions themselves. Why, every one knows, or ought to know, the way in which these petitions as long as from here to Washington street are got up. It is easy to get signatures from the motive that the competition will reduce the fare for passengers and freight, and that no responsibility rests upon the signer. The petitioners often know nothing about the object, they take no obligation, and are not bound to construct or aid the work if it be granted. The petitions are worth nobody's regard unless they set forth the reasons for the grant for which they pray.

Then among other questions fit to govern this case and applicable to many others: What is the true policy of the State with regard to granting charters for railroads parallel to existing roads; the policy, not looking to the views of individuals, but to the great good of the community? It undoubtedly is to resist the establishment of parallel lines: to bring no two roads nearer to each other than the necessities of the

public require; to encourage no destructive competition; to enter upon no such policy at all, but to encourage the existing roads, by giving them the benefit of their enterprise, so that the renewed effort may be felt at their extremities, and thus from those points new ramifications may be produced, and inducements may be given to run out branches like little streams in every direction. All this question lies in the discretion of the Legislature, but every attempt to establish a parallel road on the ground of the increase of business, deserves the closest attention before it is taken up by the Legislature.

It should receive such attention for public as well as for private reasons, for every act which is passed, that produces injurious competition, when it is foreseen that it must do so, is not only an injury to the actual rights of the prior existing railroad, but it is an injury to all men, inasmuch as it shakes the confidence of individuals in the rights guaranteed to them by the Legislature. It disturbs public confidence, and every act that disturbs public confidence, of necessity not only injures the one Corporation, but every existing Corporation, and every man of property or industry in the community. If men see that property in railroads is not secure, and that it is yielding to the claims of speculators, do you suppose that capitalists are going to invest in them under this state of things? Why, I undertake to say, that there cannot be a more chilling blast come over the progress of public improvements here, than the idea that the faith of the Commonwealth is not to be fulfilled entirely and thoroughly to every man who invests under a charter from the State. I speak with the greatest respect, but I say that this has been proved. I say it without imputing motives to any body, but I say it because I believe it, that the act establishing the Boston and Maine Railroad Extension Co., has shaken the faith of the community in property invested under such charters. I know a man who is now in this house, to whom the confidence of broken families, of widows and orphans, of administrators, has given without fee or reward the investment of great amounts of trust property. I know that as soon as the Governor had set the seal of the State to the act incorporating this Boston and

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Maine Railroad Extension Co., he sold out every dollar's worth of stock in these chartered companies which he owned in the world. He said that he would not trust the bread, and homes, and covering of widows and orphans, in property that might be thus assailed!

We have other great interests at stake. We cannot, under dread of this kind, complete the great line of railroads along the Connecticut River; nor the Canada Railroad. We can have no farther extension of the Fitchburg road, the road which was to carry Boston to Montreal, or, more properly speaking, to bring Montreal and all Canada to Boston. For if these things are to be done, who does not know that it must be from the faith of the men of Massachusetts in the government of Massachusetts!

It appears to me, therefore, most important that every grant of powers of this kind should be made in the full conviction that there is a public call for it, and then in the conviction that it interferes with no other man's rights.

I now approach the character of these petitions. That of Mr. Livingston and other asks for a road commencing eighty rods above the Lowell depot, and passing across the streets of Lowell and the tracks of the Lowell Railroad, to intersect the Boston and Maine Railroad in South Andover. Now it does not state its object fairly and truly, and that is reason enough to reject it. Why does not Mr. Livingston tell the Legislature what he means, what his object really is? Why does he cry out "Andover," when he means "Boston"? That is the question. It is perfectly evident from the plan, measurement, and distances, that this is intended to be another railroad communication between Lowell and Boston; and if it had not been for Boston, that we never should have heard of another railroad from Lowell to Andover! Why does it not go to Andover? But he actually goes away from it so far to the right as to make his road as good a road to Boston as any other. To be sure it is about four miles longer than the present road, but then it comes into the centre of the town. It connects with the Boston and Maine Railroad if it is not a subordinate agent of the Boston and Maine Railroad, and the Boston and Maine Road is coming into the centre of our city,

and taking as much land as it wants, and then says to those who are asking for damages, "We are a Corporation, acting under the authority of the Commonwealth; it does not become a private individual to contend against the majesty of Massachusetts." This high tone of Corporations claiming that their own private speculations are to be respected and favored as the works of the Commonwealth, under whose authority they act, sometimes reminds me of the swelling of the little constable with whom Mr. B—— got so provoked as to give him a sound shaking. The little man, for he was n't more than five feet one inch, at first thought of prosecuting, but he relented, and drawing himself up, contented himself with admonishing his assailant:—"Sir," he said, "do you know what you have done? I shall take no vengeance, but hereafter understand—when you shake me you shake the Commonwealth of Massachusetts!"

Now, if it is apparent from the plan, that it is the object of these petitioners to get a road to Boston, it is still more apparent from the evidence. That was the language of gentlemen when they came to solicit the subscriptions of petitioners. This is the testimony of Messrs. Gray, Simonds, Ayer, Bancroft and others. They were told it would make a cheaper road to Boston; that there would be cheaper freight and cheaper fares for passengers. The idea was, that the business from Lowell to Andover would pay the expenses of the road, and that the Boston business would furnish the profits. It is clear that the object is a new railroad communication between Boston and Lowell.

What is the rest of the evidence? Mr. Gilmore testifies, that to make the fares ten cents cheaper on this new road, would take a great part of the business from the Boston and Lowell road.

If it were clear that the real object were a road to Andover, and that not caring to do so, or intending to do so, they had in effect created a new railroad from Boston to Lowell, the prayer of these petitioners could not be granted. For what is the promise that the Legislature made in the charter of the Boston and Lowell Railroad to that company? It is that no other railroad shall be authorized to be made within thirty

years, leading from Boston, Charlestown, or Cambridge to Lowell, or to any place within five miles of it. There is nothing said about a straight road, a circular road, or a crooked road. It is simply that there shall be no road. That does not mean that nobody may go off from Boston in one direction, and get to Lowell by other roads far off; but it is a substantive proposition, that no road shall be established, a leading or principal object of which shall be, the conveyance of people or merchandise from Boston to Lowell. A person may go round from Boston by Stonington, thence to Norwich and Worcester, and through New Hampshire, if he pleases, to Lowell, and the use of the railroads he may have travelled upon would be no violation of the promise of the Legislature. But the question is, is this road in substance or reality intended to be a road from Boston to Lowell? Will the travel between the two cities or any principal part of it be on the new road? If it should be, that road comes within the provision of the charter, and this is the question: Is this not in substance a road between Boston and Lowell? or is it a road leading *bona fide* somewhere else, and having no tendency to take the traffic of the Lowell Railroad? No matter whether it is one entire road, or composed of pieces, if it comes at all into competition with the Lowell road, it is prohibited by the grant of the Legislature to that road.

The learned counsel who addressed you on behalf of the petitioners says, that this proviso must be construed strictly. I should like to know what strict construction can make it authorize a parallel road. It must have a reasonable construction. In consequence of the grant, the Corporation have spent their money in building this road, and it cannot be shown by any reasonable construction of it, that any road can be made which will take away the traffic of the prior road.

Is there any complaint of the conduct of the present corporation? or are their profits enormous? By the charter, they may receive ten per cent. per annum, they have never received but eight. They have kept within their legal allowance by one fifth. These are the general principles that apply to this case. There are besides this other roads. There is another asked for to branch off from the Boston and Maine

Extension Railroad to run down to Salem, and I believe there are others still. These may be considered when they arise.

There can be nothing more pernicious than to multiply parallel railroads near the great focus to which all tend. If a partial railroad is running near a long railroad, the long railroad can reduce its fare, on that part of its line until it ruins the short one. I may remind the Committee of a remarkable attempt to do good to the community by raising up competition. I refer to that in New Jersey. The State of New Jersey, lying along our Atlantic coast is a great thoroughfare for travel, and was early selected as a place for improvements in the modes of transportation. They began with a canal, and the line through the State was afterwards finished, consisting partly of a canal, and partly of a railroad. An opposition obtained a charter subsequently for another line of communication through the State, consisting also of a railroad and a canal, the canal being parallel to the old railroad, and the railroad to the old canal. And what has been the consequence? The richer has bought out the poorer, and now owns the whole of both lines of communication, and is a more complete and onerous monopoly of the sort, than any other in the United States, because the traveller is now made to pay for the expense of both lines. I can easily conceive some such case here. A long railroad may demand, on the part of its line opposite to a parallel short one, only such low rates of fare as will compel the short road eventually to sell out to its richer competitor. The successful party may then put up his rates of fare, in order to pay for the cost of both, which he has been obliged to incur, and that is all the good the public will get for it.

There are some objections to Mr. Livingston's plan for his railroad so obvious, that I need only to allude to them. In the first place, it does not begin at Lowell, but runs up the Nashua Railroad for some distance, and there his depot and engine-houses are to be built; and as the New Hampshire world comes down towards Boston, they can thus be taken into his cars, some eighty rods farther north than at the Lowell depot. To accommodate this travel, — about thirteen

hundred persons in a year, I believe, — he goes thus out of the way. The road then runs down towards the Concord river, crossing six streets on a level at acute angles, thus at once accomplishing two evils, — cutting up all the lots diagonally, and keeping the locomotive engines of the road running along by the side of streets as long as possible. Having thus passed by the Lowell depot, it turns round and goes on to Andover. Now why is all this? The evidence is that the Lowell depot is in the right place. All the streets and buildings were erected with the idea of having the depot and the railroad there. If this road is built, running by and through men's houses, and cutting up their land, it is evident that its effect in Lowell itself would be seriously to injure real estate there. It can accommodate nobody, except those whose property is just so situated as to be taken by the railroad and brought more into the market.

As to the petition of Hobart Clark and others, all I wish to say is, that I see no exigency requiring it.

I will merely state, in relation to those roads now contemplated, in addition to those constructed, along the Connecticut river, and in continuation of the Fitchburg road, and for that road itself; — that there is wanted,

To complete the Fitchburg road \$700,000; as much for the Connecticut river road; and for the Burlington road \$2,500,000; and therefore, before Boston enjoys all these, and gets the advantages expected to be derived from the portions already commenced, there must be a further expenditure of from three and one half to four millions of dollars. There are capitalists willing to furnish these sums. If you give them security that the charters will protect them from losses arising from unjust competition, the money is ready, and will be forthcoming. But confidence is delicate; it is easily disturbed; and if by any action of this Legislature it is disturbed, all progress from these means will come to an end.

I had intended to say a word in regard to the Eastern Railroad in connection with these petitions. That road has not divided six per cent. There will be an opportunity hereafter to enter more fully into its relations with this subject. It is one of the cases to be affected by the general principle. The

Committee will establish such a principle as will be just to this road as well as to the other.

The counsel for these petitioners has kindly furnished us with the points upon which he expects to maintain their prayer. There are nineteen points stated by the learned counsel. I have read them all through, to see if, in any one of them, he meant to contend that there was any public utility which demanded a new road between Boston and Lowell. He has not touched the point. He talks entirely about Andover, making no allusion to the opening of a new route to Boston; so that if accidentally a man should go down his new road to Wilmington, and come to Boston on the Maine road, it is a case not provided against, and therefore cannot be prevented if it should happen. And all through his nineteen points, it is not suggested, that a road is needed from Lowell to Boston. These were undoubtedly points for the petition, and the petition was for the Legislature, for it was stated in evidence, that the petitioners said that they doubted whether it would be best to put forth this idea — that it would furnish a cheap route to Boston — before the Legislature. That doubt is confirmed.

The first point states that the railroad proposed “is a cross line of great public importance, connecting Lowell, Nashua, Manchester, and Concord, and ere long,” — mark that it is ere long — “to connect Worcester, New York, and the West, with Andover.”

That is quite a rousing idea for old Andover! The whole of the great West is presented to the imagination of the professors and students of the Theological Seminary at Andover!

Mr. E. H. Derby, of counsel for the petitioners, here requested Mr. Webster to read the rest of the point, which he did.

It is to connect, as I said — “Worcester, New York, and the West, with Andover, Reading, Haverhill, Salem, Newburyport, Exeter, Dover, and the East.” This is a magnificent undertaking. It runs from the Penobscot Bay to the Gulf of Mexico.

The next points are; “The cross traffic, independent of the business between Lowell and Boston, will pay the cost of running the line, and an interest of more than eight per cent.

on the proposed outlay, and greatly benefit Lowell, by introducing bricks, hay, and granite, in very large quantities, at reduced prices. Thirdly, the line proposed, as compared with the circuitous route by railroad now existing, involves a saving of eight miles in distance; from half an hour to an hour in time. Certainty in place of uncertainty in the connection is essential to transfer business to the railroad from five lines of stages now running; while the saving in running expenses, the granite quarry and local business of Tewksbury, and the business to be diverted from stages, will pay a large interest on the outlay."

I have said all I have to say on this point. Whether there is such an exigency, as to authorize this cross road, I leave to the consideration of the Committee. But something is said of Tewksbury. Does the requisite exigency arise for a railroad from Tewksbury to Andover? And this puts me in mind of the evidence of the noble men of Tewksbury on the stand here. I honor the men of Tewksbury. They said this road would furnish them a short run to Boston; but, they added, that if it would encroach upon the rights of the Lowell Railroad, they didn't wish to have anything to do with it.

The 4th point recites "that it will be the true policy of the State to entrust this line to the citizens of the towns most interested therein, and not to permit one corporation, directly or indirectly, to monopolize two of the most important outlets from Lowell to the South and East." All I have to say is, that there is no connection between the other corporation petitioned for, and the Boston and Lowell Railroad.

The 5th point is "that the line proposed by Livingston and others, by striking the Maine line at Ballardvale, best accommodates the travel between Ballardvale, Reading, South Reading, Lynn, Salem, and the city of Lowell." This is to give a reason for trending so far south, and getting in the direct line for Boston, but it is to be remembered, that while they remember Lynn, Reading, Salem, &c., they have forgotten to mention Boston, Charlestown and Cambridge, towards which the charter of the Boston and Lowell Railroad should prohibit them from going.

The 6th point maintains "that the sole object of the exclu-

sive privilege set forth in the charter of the Boston and Lowell Railroad was to prevent a direct parallel road from being run between Boston and Lowell within the limits prescribed, and not to prevent branch railroads from Lowell being made to intersect other railroads running from Boston outside of such limits." Why is it the object to prevent a direct parallel only? There is nothing said in the charter, and there is nothing in the nature of the case, to imply that an indirect parallel would be permitted rather than a direct one. The State simply say, that no other road should be built between these limits. If the Legislature meant no direct road, why did it not say so? If it had, this road, I am assured, would never have been built. It has now stood fifteen years of the thirty for which it is protected, and I am confident that it will be protected for the remaining fifteen years.

The 7th point is, "that there is in such charter no compact between the State and the Boston and Lowell Railroad Corporation, that such a branch as that now proposed should not be built." Well! the only question is as to the meaning of the contract, and I say that it is its fair meaning, that no road either direct or indirect should be built in such a way as to take away its custom.

The 8th point is, "that the intersection of the Boston and Maine Railroad by such branch, is no violation of such compact if it exists, inasmuch as the Boston and Maine Railroad lies without the limits defined in the Lowell charter, and the intersection is outside of the line." There are no lines defined in the Lowell charter. There is a point spoken of as the terminus; no line is mentioned. All lines are prohibited within five miles of that terminus. This is not a question of lines, it is a question of effect. The Lowell road was designed to take up a certain description of travel and business in which it was to be protected; not a word is said about lines.

The 9th point is, "that such clause in the charter, is to receive a most rigid construction, as adverse to the general policy of the State and its interests; and favoring monopoly, to which our institutions have ever been hostile." What rigid construction can alter the plain meaning of the clause, that there shall be no other road between these termini? There

are no two constructions to be put upon it. Rigid construction against a monopoly! Now this is refreshing! They come for a monopoly themselves, they ask for a railroad charter, they ask to be clothed with the powers of a monopoly. We come in the name of the people and ask to be protected. It is time, in the name of the people, to have done with this slang.

The 12th point is, that the contemporaneous exposition of the clause was hostile to the views of the Lowell Railroad.

Mr. Webster was here informed that this point had been ruled out by the Committee.

This point it seems has been ruled out; well, I am sorry for that. At any rate, in regard to it, I will refer to the doctrine to which it alludes. It was first broached in this Commonwealth, in the discussion of a cause, which terminated in a manner more unfortunate, more disappointing to my professional expectations, more — I may say — confounding to my professional judgment, than any in which I have been concerned in a practice of forty years at the bar — I refer to the case of the Warren and Charles river bridges.

I cannot but consider the act of the Legislature in that matter, and the decision that followed it, as unhappy, unfortunate, bad in themselves, and lamentable as a precedent. I have no desire to arraign anybody's motives or intelligence; on the other hand, I take it for granted, that all engaged in it, in the Legislature here, and afterwards in the Supreme Court, and finally at the Capitol at Washington, acted from the best of their judgments. Still, I must say, that when I look back now, after a long lapse of years, and read the judgment of those judges who maintained the Constitution against the act of the Legislature, and on the other hand, that of those judges who sustained the act of the Legislature against the Constitution, I must say, that I see, or think I see, all the difference between a manly, honest and just maintenance of the right, and an ingenious, elaborate, and sometimes half shame-faced apology for what is wrong.

Now I am willing to stake what belongs to me as a lawyer, and I have nothing else, and to place on record my opinion,

that that decision cannot stand; that it does not now enjoy the general confidence of the profession; that there is not a head with common sense in it, whether learned or unlearned, that does not think, not a breast that does not feel, that in this case, the right has quailed before the concurrence of unfortunate circumstances. There is no man, however high his standing in the profession, or however little learned, who does not see, that the proprietors of the Charles River Bridge have been deprived of property against their right. And how was this done? An act was pressed, session after session, sometimes negatived, but still pressed, applying for rights granted to them exclusively by their charter. The cry was raised against vested rights, and the act was passed; and yet there were many and many who still trusted that the question would be set at rest by the maintenance of the right by its reference to the Supreme Court of this State. What happened there? The first impression had been already given, because the Legislature had passed it. It had passed the Legislature because its unconstitutionality did not fully appear, and it therefore got before the Court, and to the Court its unconstitutionality did not fully appear, the bench remaining, I believe, equally divided. At Washington, the argument was, that the Legislature and a very eminent Court of this State, had given it their sanction; that it was a State question; and as it had been decided in both these ways, by the State, that that Court should follow its decision. And so it went, and by a vote of four to three, the judgment of the State Court was affirmed there. And if there be error in the opinions of those who did not concur in the judgments here or there, if those opinions prove any want of legal perception or thorough legal learning, insight, moderation or discretion, or of consistent principle, — without speaking of any near me, — let me come in and take my humble share with Story, and Thompson, and McLean. I hope it may be an isolated case, and that the Legislature will be admonished by it; and that, standing as Massachusetts does, with so much money placed in Corporations on the faith of her statutes, that the Legislature will be careful to maintain that faith.

I would speak of Massachusetts elsewhere as she deserves;

there is no necessity for gasconade here. But I shall presume to stand on the great conservative character of the community. I know nothing on which the prosperity of a state so much depends, as upon the stability of its legislation. Legislation must provide protection for all rights, however invested, — industry and progress will follow.

What was the great argument here and elsewhere in the Charlestown Bridge case? It was urged that the shares cost so much originally and were now paid for. This takes us back to the consideration before alluded to. The scrip in our joint stock corporations passes from hand to hand every year. When Messrs. Russell, Dawes and the rest commenced the erection of Charlestown Bridge, the stock was naturally low. As the value afterwards increased, some of the original holders sold out, and other people bought in. And although it is true that the shares were at one time worth eight hundred dollars, who had pocketed this increase? The then holders had each year paid the then price. It was said that the shares cost only so much originally, and had by that time been paid for over and over again. But the fact was that they were then worth all that they then cost.

Let us then look to furnishing security to our moneyed institutions. The capitalist asks for a charter, and when he obtains that he is satisfied. He ought to be able to feel that the rights granted to him are secure.

If, then, the real object be with these petitioners to get a new route to Boston, as it undoubtedly is, and there is no disguise that can cover it, — is there, then, a public demand for another road, four miles longer than the existing one, and can one be built without encroaching on the Lowell charter?

To say that I feel strongly for the defendants in this case only would not be true; but I am most urgent for them, because I feel strongly for all such cases, for the security of private property and of public principle.¹

¹ The Joint Standing Committee on Railways and Canals recommended that the petitioners have leave to withdraw their petition and the report of the Committee, Senate document No. 30 of 1845, was accepted in Concurrence, February 15, 1845.

Argument in the Passenger Tax Case

UNITED STATES SUPREME COURT, December 23, 1847.

IN the different cases known as The Passenger Cases, which were argued and considered together, and which are reported together, in 7 How. (U. S.), 283, the first argument was made at December term, 1845, in one case only, by Mr. Webster and Mr. D. B. Ogden, for the plaintiff in error, and Mr. Willis Hall and Mr. John Van Buren for the defendant in error; and in one of the cases, at a later term, Mr. Choate was associated with Mr. Webster as junior. Although no opinion was ever rendered by the court, as a court, yet the learned and lengthy opinions of the different judges have, in effect, become one of the great pioneer decisions, and a prominent landmark in the development of our internal history as a nation under the Federal constitution. The case has been constantly cited and dwelt upon, as a certain guide, by the highest of our courts, during the last half century; and in the recent, important case of *Austin v. Tennessee*, 179 U. S. 343, 344, 372, 374, at October term, 1900, it is thrice referred to and considered. Yet, while other arguments are included in the report of the case in 7 How. (U. S.) 283, that of Mr. Webster is unfortunately not reported.

The conclusion reached in The Passenger Cases was, that the statutes of New York and Massachusetts which imposed taxes on alien passengers arriving at the ports of those States, were invalid because contrary to the Constitution and laws of the United States. Under date of Feb. 3, 1849, Mr. Webster thus wrote of this cause to Mr. Blatchford, shortly before the court announced its conclusion: "In my poor judgment, the decision will be more important to the country than any decision since that in the steamboat cause." (*Gibbons v. Ogden*, 9 Wheat.) "That was one of my earliest arguments of a constitutional question. This will probably be, and I am content it should be, the last. I am

willing to confess to the vanity of thinking that my efforts in these two cases have done something toward explaining and upholding the just powers of the Government of the United States on the great subject of commerce. The last, though by far the most laborious and persevering, has been made under great discouragements and evil auspices. Whatever I may think of the ability of my argument, and I do not think highly of it, I yet feel pleasure in reflecting that I have held on and held out to the end. But no more of self-praise." *Life of Webster*, by George Ticknor Curtis, Vol. II. p. 373.

The report of Mr. Webster's argument, printed here, was originally published in the correspondence of the *Baltimore American*, and republished by the *National Intelligencer* as the accepted account.

In answering the argument that it was New York which poured of her abundance into the lap of the National Treasury, Mr. Webster admitted the great commercial importance of New York, the skill and industry of her mechanics, the great distinction of her professional men, her present pre-eminence and destined greatness, but said she was the mere distributing point of the imports of the Union. Much of her wealth was derived from the fact that she was so placed as to be the distributing agent of the government, and of the consumers and producers of other points of the Union.

Unaided by the rest of the Union, New York would be as nothing, a huge deformity, a *caput mortuum*, and nothing more. So in regard to her courts, which had rendered a decision in this case against the plaintiff in error.

However respectable these courts, it became the duty of this court to revise their decisions, and, if the constitution of the United States had been encroached upon, to reverse their judgments. This court was charged with precisely this duty, the revision of the decisions of the courts below, and no matter how respectable the courts were or were presumed to be.

Mr. Webster spoke powerfully of the sanctity of the decisions of the Supreme Court, in reply to a remark of the opposite counsel that the people were beginning to forget the life tenure of the Judges, in consequence of the infusion of popular sentiment into the decision of the courts. He considered this as

a very left-handed compliment at best, and it was one he certainly should not pay the court.

The early decisions of this court were in some measure inherent to the constitution itself. They were, indeed, a part of the constitution, and he could not be so disrespectful to the memory of Jay, Ellsworth, Marshall, Story, Thompson, Baldwin, Iredell, and others, as to reflect upon decisions made by them, and interwoven as they were with the constitution of the government.

Mr. Webster early came to the argument of the case, and spoke with a power and force which certainly cannot be surpassed, if equalled, by any counsel or jurist in the land.

The concluding remarks of Mr. Webster were some stirring comments upon the commercial power of the country, and some eloquent references to the circumstances which originated its existence in the constitution of the United States, which was mainly the necessity of the States. These could not thrive without the existence of this power, and with some general depository of its enactment such as the Congress of the United States.

Authorities were quoted to show that commerce extended to persons as well as to things; to masters of vessels upon whom this tax was imposed, as to the vessels over which they had command. The greatest difficulty, it was argued, would flow from the surrender, now, or the acquiescence in the exercise of such powers on the part of the States.

Mr. Webster incidentally alluded to the question of domestic slavery, which had been made prominent by counsel upon the other side. It was, he said, a peculiar institution, the existence of which was recognized by the constitution of the United States. There it was placed by those who framed its existence, and he did not wish to disturb it, nor should he lift his finger to do so. It belonged not to him, but to those alone who had power over it.

Argument in the Case of Mathewson v. Clarke

UNITED STATES SUPREME COURT, January, 1848.¹

THIS case was an appeal from the circuit court of the United States for the district of Rhode Island in a suit in equity brought in 1830 by Willard W. Wetmore of New Haven, Conn., who died in 1834 when Clarke, the appellee, became his administrator, against Mathewson. It was claimed that Wetmore was admitted in June, 1821, as a member of the firm of Edward Carrington & Co., and that Mathewson should render an account of his agency as master and supercargo of the ship *Mercury*, on a voyage which he prosecuted before he became part owner of that ship, and of his agency for that ship after he became a part owner, and of his use of her owners' funds, after her condemnation and sale, in the ship *Superior*, three-fourths of which he chartered at Lima in November, 1825. The case, in which Mr. Webster was senior counsel for Mathewson, was heard on exceptions taken to a report of masters in the cause and the decree of the circuit court was reversed. As the complainant was held to have been first interested in the *Mercury* and her cargo in her voyage from Gibraltar in December, 1822, the exceptions to items charged against the defendant and allowed to the complainant, arising from private trading by the defendant, were overruled, and the exceptions applying to allowances made to the complainant against the defendant, growing out of the first voyage of the *Mercury*, ending at Gibraltar, were sustained. The important law points decided were that a new member in a partnership can, after the expiration of the firm, sue in equity for his share of the profits; that a master and supercargo, who has agreed, in full for all services and privileges, to receive certain wages, with a fixed commission and a share in the profits, cannot traffic for his own benefit, nor can he, after losing one vessel and chartering another, and employing the firm capital in his trading on the latter vessel with

¹ This case is reported in 6 Howard, pp. 122-146.

all the partners' consent to the original terms, depart from the rules adopted for regulating the transactions of the first ship.

Mr. Webster for the appellant, in reply and conclusion, gave a particular narrative of the course of the suit, and the transactions between the parties. The first proposition raised by the exceptions is, that the complainant has no right to maintain this suit. We say that he had no interest whatever except as a partner, and that he cannot become so without our consent. It is necessary here to make a distinction between the first and second voyage. Mathewson was not a partner during the first voyage of the Mercury, and after that was over, became a partner to the amount of one tenth. It may be said, that, if Mathewson was not then a partner, our objection to the complainant's right to sue for the first voyage does not apply. But the answer to this is twofold :

1. Because this bill counts on a special agreement, to which Wetmore, the complainant, was no party. His claim as assignee does not aid him in this.

2. Wetmore never had a particle of interest in the first voyage of the Mercury. This terminated at Gibraltar, in November, 1822, and in December following a new voyage was commenced. But it does not appear from the record that the Mercury and her cargo constituted any part of the \$118,987 which was credited to the old concern when a change of the books took place, in 1821. On the contrary, the following extract from the record shows that the Mercury was not brought into the new partnership until the 7th of February, 1824.

<i>E. Carrington & Co.,—old concern,</i>				CR.
1824, 7th Feb.	By ship Wm. Baker, as cash,	July, 1821 . .		\$7,000
	" Nancy, "	June, 1821 . .		3,500
	" Trumbull, "	Jan'y, 1823 . .		3,500
	" John Brown, "	July, 1822 . .		3,612.50
	" Fame, "	May, 1823 . .		1,500
	" Integrity, "	June, 1821 . .		7,500
	" Mercury, at Gibr.,	Dec'r, 1822 . .		5,000
	" Lion, "	1821 . .		14,500
	" General Hamilton,	1822 . .		2,300
	" George, "	1821 . .		10,000
	" Panther, "	1822 . .		22,000
				<hr/> \$80,412.50 <hr/>
By adventure ship Mercury, voyage from Gibr. to Chili, \$50,619.18, — for one half . . .				<hr/> \$25,309.59 <hr/>

Consequently Wetmore never had any interest in the first voyage. The transfer at the bottom of the account is for one half of the outfit, but does not include any profits at all. He has no right to call upon Mathewson for any explanation of his proceedings.

With respect to the subsequent voyages, the right of the complainant to sue is sustained upon two grounds:

1. That Carrington & Co. had admitted him as a new partner in their firm; and,

2. That the complainant was an assignee.

- 1st. The authorities already cited, Tidd, Collyer, Johnson, and Maddock, are clear, that no new partner can be admitted without the consent of all.

- 2d. It is said that he was an assignee. But he says himself in the bill that he was a partner. The amendment to the bill, putting his claim upon the ground of being an assignee, does not vary the facts in the case. He was just as much an assignee without putting that in. But his claim to be assignee is only an evasion of a well-settled rule of law. Every new partner can claim to be assignee. In this case he would be a very strange one. He had as much right to control the others' shares as they had to control his. He could draw bills of exchange, settle accounts, &c. I had supposed that an assignment of a chose in action was recognized upon the principle that the assignor had nothing more to do with it. But not so here. Carrington & Co. had as much power over the property as they had before. There was no transfer of any distinct and specific interest. If Carrington & Co. had failed, what would have become of the thing assigned? It is said that the change was of no consequence to Mathewson. But the answer is, that the rule is general. We are not bound to show any reasons. If we were bound to do so, they might be given. Who knows whether or not Wetmore was an enemy of Mathewson? Some unfriendly things were done afterwards; for example, they wrote to Alsop to take the business out of Mathewson's hands. How can we know that Willard Wetmore did not do this? It is said, also, that he was not a new partner, because he was only admitted to be a partner in the house of Carrington & Co., which house *eo nomine* was a member of the copartnership,

and that therefore the copartnership remained unaltered. But this makes a commercial firm a corporation. If a contract be made with a firm composed of three persons, and then a fourth be admitted, can all four sue on the contract? Certainly not. The names of the partners must all be set forth in the declaration. They cannot sue in their commercial name. It is only a corporation that can do this. If the complainant had no interest in the first voyage, it disposes of the 2d, 3d, 6th, and 12th exceptions.

The 7th, 9th, and 11th relate to the right of Mathewson to trade upon his own private account. The objection to his doing so is maintained under the 7th article of the agreement, which says that he is to have no privileges. One privilege of a captain is to carry his goods without being charged with freight. This article had nothing to do with the subject. Mathewson carried nothing out, and could only trade on his commissions. What he acquired in this way he could certainly bring home by paying freight. There are some facts in the case which are important.

1. He had only a limited capital to trade upon for his owners, not enough to fill the ship.

2. It was always contemplated that she should earn freight by carrying other goods.

3. The freight thus earned was for the benefit of her owners.

4. The ship was never full.

5. There is no allegation that Mathewson did not load the ship properly.

How Mathewson made his money is entirely immaterial. There is no pretence that he took it from his owners. He has accounted for the whole \$50,000. There was no loss or damage of any kind by him. He squandered nothing. On the contrary, his owners made a very large sum of money through his care and skill. But the opposite counsel say that he could not carry his own goods in his own ship. Why not? If he paid freight to any one else, the owners would lose that much. They might then justly have complained. The sound rule of law is, that the master of a vessel must not place himself in a situation where his interest necessarily clashes with that of his owners. Such was not the case here. It is also said, that he

should have attended to nothing else than the concerns of his owners. But he was detained at Lima for ten months without a possibility of expediting the business of his ship. Was he to sit down and think for his owners all this time?

We regard Mathewson's latter voyages as being out of the contract altogether. The parties probably never contemplated using any other ship than the Mercury. When he chartered three fourths of the Superior, he told his owners of it. They acknowledged the receipt of his letters in which he said that it was upon partnership account, and yet they held their peace upon the subject of sanctioning it. This they had no right to do. The rule is, that where an agent acts clearly beyond the scope of his authority, mere silence on the part of his principal does not ratify the act. He must prove a positive assent. Suppose all this property had been lost. The owners did not ratify the proceeding until all danger was over, and the adventure had been found profitable. But it was then too late. If this chartering was beyond the contract, and the owners claim the profits because Mathewson said he did it for the partnership, they must take the whole of his admissions together.

Opinion on The Florida Claims

APRIL 6, 1849.¹

WHILE the opinion on the Clamorgan Grant deals with land titles under Art. 8 of the Treaty of 1819 with Spain, this paper relates to that part of Art. 9 of that Treaty which deals with "the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

The questions propounded by Mr. Secretary Walker, upon which the following opinion of Mr. Webster was given, are as follows:

1. "Whether the provisions of the treaty require the losses or injuries for which satisfaction is provided, to be established judicially? And if so, whether decrees of the judges as to the amount or extent of said losses or injuries—as to cases within the provisions of the treaty—are final?

2. "Whether the measure or rate of satisfaction adopted and applied by the judges in these cases, namely, to add to the value of the property, at the time of its loss, interest as a compensation for the loss or deprivation of its use, is or is not in accordance with the laws and usages of nations, as the proper rule of redress for such injuries, and can be allowed and paid by this Department under the acts of Congress applicable to this subject?"

Opinion

It appears to me that great misconception has prevailed, respecting the true construction of the ninth article of the treaty with Spain of 1819, and of the two acts of Congress passed for the purpose of carrying the provisions of that article into effect.

¹ From a pamphlet in the Boston Public Library.

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Before the date of the treaty, and while Florida yet belonged to Spain, that is to say, in the years 1812, 1813, and 1818, inroads were made in Florida by certain troops of the United States, and injuries and excesses committed on the inhabitants.

Although Spain was now able to cede the whole territory to the United States, yet her government felt it to be its duty to cause a stipulation to be contained in the treaty of cession providing satisfaction for these injuries and full indemnification for the sufferers.

Instead of a joint commission, or mutual arbitration, to ascertain these injuries, and adjudge the proper compensation, the contracting parties agreed that this duty should be performed by a judicial tribunal. There was good reason for this. The injuries were local. They were committed on the property, real and personal, of the inhabitants. The parties were all in Florida, and the proofs all in Florida. Judicial courts were now about to be established in Florida, under the authority of the United States; and nothing could be more just or expedient, than that to these courts, sitting in the Territory, should be assigned the duty of inquiring into these cases, and establishing the right and the amount of indemnification where such right was proved. The ninth article of the treaty provided therefore, that

“The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida.”

At the commencement of any discussion of the questions arising in this case, some propositions must be received and admitted as undoubted truths.

I. The first is, that a treaty is the supreme law of the land. It can neither be limited, nor restrained, nor modified, nor altered. It stands on the ground of national contract, and is declared by the Constitution to be the supreme law of the land; and this gives it a character higher than any act of ordinary legislation. It enjoys an immunity from the operation and effects of all such legislation.

From this acknowledged truth, there results a rule of construction, of very great importance, and which is to be applied to all laws passed for the professed purpose of carrying treaty stipulations into effect; and that is, that such laws must be so construed as to conform to the provisions of the treaty, and give them full effect; and not so as to thwart those provisions and embarrass their operation and application, by imposing new limitations or conditions, or by any other means. The advantages secured by a treaty stipulation to those for whose benefit it was entered into, cannot be abridged or curtailed by any law passed for executing the treaty. The treaty and the law must be made to stand together, where they can, and so far as they can; and if, after all, there be found an irreconcilable inconsistency, the law must give way to the treaty.

II. A second general proposition, equally certain and well established, is, that the terms, and the language, used in a treaty, are always to be interpreted according to the laws of nations, and not according to any municipal code. This rule is of universal application. When two nations speak to each other, they use the language of nations. Their intercourse is regulated, and their mutual agreements and obligations are to be interpreted by that code only, which we usually denominate the public law of the world. This public law is not one thing at Rome, another at London, and a third at Washington. It is the same in all civilized states; everywhere speaking with the same voice and the same authority.

Guided by these elementary rules, let us examine the treaty and the laws.

The words of the treaty are plain: "The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida.

The terms "process of law" are the terms usually employed to describe judicial proceedings. They are exactly equivalent to the phrase "due course of law," or judgment of law.

They imply parties, a case, a hearing, a trial, and a judgment, or decision. This is their interpretation in every book of authority from Magna Charta down; and it is precisely the

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sense in which the words are used in the fifth article of the amendments to the Constitution of the United States. In that article it is declared that "no person shall be deprived of life, liberty, or property without due process of law." That is, without hearing, trial, and regular judgment.

"Process of law," as the words are used in the treaty, mean any kind of judicial proceedings, suited to the case. It may be common law process, equity process, or admiralty process, as the case may require. But whatever be the particular form of the proceeding, it must be a judicial proceeding; a proceeding which involves a hearing, a trial, and a judgment.

The treaty acknowledges that there are, or may be, persons who have suffered injuries, by the operations of the American army in Florida; and it promises satisfaction, to all such persons, when those injuries shall have been established by process of law.

To establish an injury by process of law, is to prove that injury before some competent judicial tribunal; to cause its character, and its amount, to be ascertained and fixed, and judgment thereon pronounced and declared. And this judgment, supposing it always to be rendered by a judicial tribunal acting within its jurisdiction, cannot be vacated, annulled, reversed, or altered, except by some higher appellate power, itself proceeding, also, by due process of law.

Two consequences follow from these premises:

I. No one can claim any compensation, or satisfaction, under this clause of the treaty, who cannot establish the fact of an injury, and fix its amount, by regular judicial proceeding and judgment.

II. Any one who has established the fact of an injury, and the just measure of satisfaction, by regular legal proceedings and judgment, cannot be deprived of that satisfaction, or any part of it, by the superinduced authority of a mere executive officer, or political functionary.

That would be in the very teeth of the treaty. It might just as well be said, that under this clause, an executive officer, or a political functionary, might be authorized to decide on the case of an alleged injury, and the satisfaction justly due, if any, originally, and in the first instance, without any reference

whatever to a hearing, trial, or judgment by process of law. For if that which the treaty says shall be "established by process of law" may be enlarged, diminished, changed, or altered by the mere discretion of an individual, then, it is evident, this particular provision of the treaty becomes a dead letter; and the whole clause means no more, than that satisfaction shall be made for injuries, in any way that the Government may see fit to provide; and that all cases may be disposed of, by executive agents or officers, without hearing, trial, or judgment, if they so see fit; in other words, without "process of law."

The mode of establishing and ascertaining the injury is as much a part of the treaty as the obligation to make satisfaction for it. It is an important, essential, substantial part of the stipulation. It would be no more a violation of good faith, on the part of the Government of the United States, to refuse to make any satisfaction at all, than it would to refuse that particular satisfaction which it has promised by the treaty. The parties in interest have a right to demand, that they shall have an opportunity of establishing the injuries done them, and seeking satisfaction for those injuries, in the mode expressly stipulated in the treaty; and to reject that mode, and to adopt another, without their consent, would be a flagrant injustice, and an outrage on public faith. All this appears to me to be too plain to require further discussion.

If any authority be required to show the settled meaning of the terms "process of law," reference may be had to 3d Story's Commentaries on the Constitution, sections 1782-'3, pages 660, 661. 2d Kent's Commentaries, 6th edition, pages 12, 13, note *b*. Baldwin's Views, page 137. Tucker's Blackstone, vol. 1, part 1, appendix, p. 203. *Taylor v. Porter and Ford*, 4 Hill's New York Reps. p. 140. 19 Wendell's Rep. p. 676.

We come next to consider the acts which have been passed by Congress for carrying this part of the treaty into effect.

The first act was passed on the 3d of March, 1823. The second on the 26th of June, 1834.

These acts, with their titles, are set forth and recited in the case.

These acts, or laws, were enacted in *pari materi*; the latter refers to the former, and extends its provisions. They are,

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therefore, to be considered together, and such a construction, if practicable, given to them, as shall produce a harmonious result. And I have already said, that they must be so construed as to carry the treaty, in its plain and just sense, into full and complete operation ; not so as to modify or alter it ; not so as to embarrass and hamper its provisions ; not so as to deprive the parties interested in its provisions of any of the advantages or benefits intended for them.

The principal difficulty arises from the second section of the first act ; the words of which are,

“That, in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same are just and equitable, within the provisions of the said treaty, shall pay the amount thereof, to the person or persons in whose favor the same is adjudged, out of any money in the Treasury not otherwise appropriated.”

According to the case stated, it would appear that, under the supposed authority of this section, the Secretary assumed and exercised a full appellate power over the judgments and decrees of the courts, re-examining the decrees, on their general merits, and on the whole evidence, and reducing and altering them, at his own unlimited discretion ; and, especially, that he struck out interest, in all cases in which the courts had allowed it, as being no just part of the satisfaction intended by the treaty.

Such a construction of this section as would confer this power on the Secretary of the Treasury, cannot be received and enforced, in my judgment, without overturning the plainest principles of constitutional and public law. If the section cannot be made to bear another construction, then it must be wholly rejected, as being inconsistent with the treaty, and therefore repugnant to the Constitution of the United States.

By the treaty, the injury of the suffering party is to be *established* by process of law. It is absurd to say that this provision would be satisfied by a decision of the Secretary of the Treasury. Such a decision is no process of law.

But there is a construction which may be given to this second section, without violence, which will make it sensible, proper, and quite consistent with that clause of the treaty which it was the object of the whole act to carry into effect.

The courts before whom these claims were brought, were courts of limited jurisdiction. They were courts, they were judicial tribunals; their proceedings were by process of law. Nevertheless, they were tribunals of a specific and limited, and not of a general jurisdiction.

The act of Congress declared in the first section,

"That the Judges of the Superior Courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and *adjust* all claims arising within their respective jurisdictions, of the inhabitants of said territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said territory was ceded to the United States."

I may remark, in passing, that the word "adjust" in this section is either a clerical error for "adjudge," or, if the word were really "adjust," the meaning was evidently the same as "adjudge;" because, in the following section, the act says, that the Secretary of the Treasury, on being satisfied, &c., shall pay the amount thereof to the person or persons in whose favor the same is "*adjudged*."

I may remark further, that it is quite frivolous to contend that the treaty required a judicial trial only for the purpose of proving the fact of injury, and that the amount of satisfaction may still be left to be fixed by an executive officer. To establish an injury, or wrong, done by one party and suffered by another, by process of law, is to ascertain and fix the amount of the injury, as well as the act of its having been committed. No other sense can be given to the word; and so Congress understood it, for the law provides that the courts shall receive and adjust (adjudge) the claims, and decide thereon, and that the *amount* by them *adjudged*, the Secretary of the Treasury being satisfied, &c., shall be paid out of any money in the Treasury not otherwise appropriated; so that the whole question comes again to this: What is the extent of authority which

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the second section of the act gave, or could give, to the Secretary of the Treasury, over the decrees or judgments of the courts?

These courts, as I have said, were courts of limited jurisdiction; but like other such courts, they must judge for themselves, in the first instance, of the extent of their own jurisdiction. When a case is brought before them, they must decide whether it is a case to which their authority extends; and as they decide this necessarily preliminary question, so they will, or will not, proceed to hear and decide the cause.

But their decision on the extent of their own jurisdiction may be inquired into and examined: First, by a court of appellate jurisdiction, if any such be established by law: Second, by any party called to act on the case, and whose duty it is to carry all lawful decisions of the court into execution. In such a case it is evident that the party acts at his peril, and he can judge of nothing but the very question of jurisdiction.

If a sheriff be called on to serve process, he may, for his own safety, inquire whether the court from which the process issued had jurisdiction in the case, so as that he will be justified in obeying its orders; but he cannot inquire into the correctness of the judgment on which the process issued. So, if an officer be required to collect a tax, he must first know, or be able to see, whether the tax has been levied or assessed by competent authority.

If a disbursing officer be required to pay money, he must, in like manner, take care to be satisfied that the authority requiring the payment was competent to make the requisition; but he cannot judge of the merits or demerits of the claim on which the allowance was made, and payment demanded, if it be the case of a private claim, nor of the propriety or impropriety of the decision, if the case be of a public nature. It is enough for him to see that the demand comes from lawful authority, and he needs to look no further.

Now this, I suppose, is the whole authority which the act of Congress intended to give, as it is most clearly all that it could give, to the Secretary of the Treasury in regard to the judgments of these courts. The phraseology, it is true, is not very accurate. The words are, that the Secretary of the Treasury,

on being satisfied that the decision of the court is "just and equitable, within the provisions of the treaty," shall pay the amount thereof.

This I understand to mean no more, than if the words had been, that the Secretary of the Treasury, on being satisfied that the decision is justly and equitably within the treaty, shall pay the amount.

To be "justly and equitably" within the treaty, is to be within the treaty. And if the Secretary of the Treasury finds, on looking at the proceedings, that the case was one within the treaty, that is, that it was the case of an injury committed in Florida, on Spanish officers or individual Spanish inhabitants, by the army of the United States, then he is to pay the amount adjudged.

This, in my opinion, is the entire extent of his authority of supervision. He has no right whatever to open the judgment, examine the merits of the case, weigh the evidence, and reform the judicial decision. It is preposterous to say, that when the Secretary of the Treasury exercises this supposed power, and reverses the judgment of the courts, the injury of the party complaining has been "*established*" by "process of law," according to the solemn stipulations of the treaty.

I see nothing in the second act materially affecting the remarks which I have made on the first. That act had two objects, connected with one subject.

The court in East Florida had allowed certain claims for depredations committed as early as in the years 1812 and 1813, and other claims of the same description were known to exist. The Secretary of the Treasury had rejected or reversed all judgments founded on such claims, they not being, in his opinion, within the treaty.

The act of 1834 provides that the amount of the judgments in these cases already rendered, should be paid as judgments in other cases; and that claims of this class not as yet decided and adjudged, should be received, examined, and adjudged, in like manner as the cases arising in 1818, and subject to provisos which confirm, strongly, the view I have taken of the first act.

The evident object, and all the object, of the act of 1834, was

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to place claims for injuries in 1812 and 1813 on the same footing with those for like injuries in 1818.

This act was passed, not as making any new or independent provision for claims, but simply for the purpose of declaring the sense of Congress, that the injuries committed in the years 1812 and 1813 are within the treaty, confirming, thus, the opinion of the court, and reversing that of the Secretary of the Treasury. This point is therefore now settled.

It appears that the Secretary of the Treasury, in the exercise of his supposed or assumed appellate power, struck out interest in all cases in which it formed a part of the amount adjudged by the court. If the opinions already expressed be well founded, the Secretary could lawfully exercise no such power. The courts adopted, and had a right to adopt, their own rule for assessing damages and awarding amounts in the cases before them. If they saw fit to allow interest, it was an exercise of their judicial power with which the Secretary could not interfere.

In such a case, the claim for interest was established by process of law, as much as the claim for the original injury. It was *res judicata*. It had become a judgment of a competent, and the only competent, tribunal; and the Secretary could not disturb it, by rejecting any part, any more than by overthrowing the whole. But as this is an important question, I propose to consider it on principle, and independent of the judicial decision in a particular case.

A vague notion has been prevalent, and the expression of it has often been repeated, that the Government of the United States never pays interest. This is not at all correct, in point of fact. Interest has been allowed to claimants by the acts of Congress in almost innumerable instances.

But if such a rule did exist, it would not affect this case in the slightest degree. Nothing more can be understood from any such rule, than that in matters of account, or on deferred debts, claims, or demands, the Treasury Department does not allow interest. This proceeds on the presumption that accounts will be promptly rendered, and all claims and debts presented and paid when due.

But in cases such as I am now considering, interest is allowed, not as interest in its ordinary sense, that is to say, as augmen-

tation, running and growing on a fixed sum. It is regarded merely as a part or element in the loss or injury, or as a just mode of fixing the amount of damages.

An individual has suffered a wrong, a loss and injury, inflicted on his property, for which the Government is liable, and for which it feels bound to provide him redress. But that redress cannot, in many cases, be instantaneous or immediate. Before it can be possibly obtained in the appointed course, much time is consumed, much personal attention demanded, and often heavy expenses incurred. These are all direct and immediate consequences of the original loss or injury; they form a part of it, and in all justice and equity enhance the just claim for indemnity.

Different tribunals deal with these portions of the loss and injury, in different ways, all of them being reasonable in themselves. One thinks it just to make specific allowances for the loss of use of capital, and for time, expenses, and charges; another, as a simpler mode, makes one allowance to cover them all, under the name of interest, and adds this to the amount of the original loss, as proved; a third combines all parts of the compensation together, forms one aggregate, and awards a round sum, or sum in gross for the whole. It is in the discretion of any tribunal, called on to make satisfaction for a loss or an injury, to adopt either of these modes.

But the importance of this question calls on me to go further; and I maintain that it was the bounden duty of the courts to add interest, in these cases, to the original amount of loss proved. They could not escape from this duty, without a manifest departure from principle.

We are now construing a treaty, a solemn compact between nations. This compact between nations, this treaty, is to be construed and interpreted throughout its whole length and breadth, in its general provisions, and in all its details, in every phrase, sentence, word, and syllable in it, by the settled rules of the law of nations. No municipal code can touch it, no local municipal law affect it, no practice of an administrative department come near it. Over all its terms, over all its doubts, over all its ambiguities, if it have any, the law of nations "sits arbitress."

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The treaty, in this 9th clause, speaks of satisfaction to be made for injuries ; and injuries which had been committed by violence, by armed men, acting without right, and without authority. And I maintain that there is, in the code of national law, a fixed and settled rule, founded in reason, and established by the highest authorities, by which satisfaction for such injuries is to be ascertained and adjudged.

This rule is laid down by Rutherford in these terms :

“In estimating the damages which any one has sustained, when such things as he has a perfect right to, are unjustly taken from him, or withholden, or intercepted ; we are to consider not only the value of the thing itself, but the value likewise of the fruits, or profits that might have arisen from it. He who is the owner of the thing, is likewise the owner of such fruits, or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself.” — Lib. 1, chap. 17, sec. 5.

The language of Grotius is :

“The loss or diminution of any one’s possessions is not confined to injuries done the substance alone of the property, but includes everything affecting the produce of it, whether it has been gathered or not. If the owner himself had reaped it, the necessary expense of reaping, or of improving the property to raise a produce, must also be taken into the account of the loss, and form part of the damages.” — Campbell’s Grotius, vol. 2, pages 195, 196. Lib. 2, chap. 17, sec 4.

In laying down the rule for the satisfaction of injuries, in the case of reprisals, in making which the strictest caution is enjoined not to transcend the clearest rules of justice, Mr. Wheaton, in his book on national law, says :

“If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something of the former, and apply it to its own advantage till it obtains payment of what is due, together *with interest and damages*.” — Wheaton on International Law, page 341.

Mr. Wheaton, in the above passage, has copied and hardly varied the text of Vattel. — Lib. 2, chap. 18, sec. 342.

To avoid trouble and detail in ascertaining the actual amount of damages or injury, resulting from the loss of the fruit, or profit, of the thing lost, or destroyed, the modern practice of nations, when making compensation for losses and injuries by joint commissions, as well as the daily practice of courts sitting under the law of nations, is to allow interest, at the legal rate, as a compensation for the loss of fruits and profits, as a substitution for an actual and detailed account of such fruits and profits.

That the prize courts are governed by the laws of nations, see Kent's Com. 5th edition, pages 68, 69, 70 ; 9 Cranch, 191, 244.

The Supreme Court of the United States uniformly holds the same doctrine :

"The prime cost or value of the property lost, and, in cases of injury, the diminution in value by reason of the injury, *with interest thereon*, affords the true rule for estimating damages in such cases." — 3 Wheaton, page 546. — The Amiable Nancy.

See, also, 1 Gallison's, 315, to the same point, case of the Lively.

The rule is exactly the same in the English courts, sitting under the law of nations. — 2 Dodson, page 84.

It now only remains to be added, that the Government of the United States, in its intercourse with foreign nations, and in demanding at their hands reparation for injuries, has not only recognized the principle, and the rule, as above stated, but has affirmed them, with emphasis, and insisted on their application in all cases. It will hardly be thought necessary to go through our whole history, to collect cases to this point. I content myself with calling attention to one of the most conspicuous, and which it is quite impossible to distinguish, in point of principle, from the cases provided for in the 9th clause of the treaty of 1819, which I am now considering.

A question arose, under the Convention of St. Petersburg, between the United States and Great Britain, respecting property alleged to have been carried away by the British forces, at the close of the last war with England, in contravention of the stipulations contained in the treaty of Ghent. Great Britain

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admitted the carrying away, but denied that it was any infraction of the treaty. The question in difference was submitted to the arbitration of the Emperor of Russia, and he made an award in these terms:

“The United States of America are entitled to a just indemnification from Great Britain for all private property carried away by the British forces.”

For the purpose of carrying this award into effect, a joint commission was instituted to sit at Washington, the American commissioner being Mr. Langdon Cheves, and the British commissioner, Mr. George Jackson. They differed on the question of interest. In the end, the matter was compromised, by the payment, on the part of Great Britain, of a gross sum, which was distributed by the Government of the United States, first, in paying off the principal of each claim, and secondly, for paying interest on the several claims, so far as the residue of the sum received would extend.

The claim of the Government of the United States was clearly and ably set forth by the American Commissioner, Mr. Cheves; and to avoid length, and repetition, I append to this opinion extracts from his remarks.

The treaty between the United States and Mexico, of the 11th of April, 1839, provided for the institution of a joint commission for ascertaining and determining the claims arising from injuries to the persons and property of the citizens of the United States by Mexican authorities.

The 1st and 5th articles of the treaty provided as follows:

ARTICLE 1. “That all claims of citizens of the United States should be referred to a joint board of commissioners, who should be sworn impartially to examine and decide upon said claims.”

ARTICLE 5. “That the said commissioners shall, by a report under their hands and seals, decide upon the justice of the said claims, and the amount of compensation, if any, due from the Mexican Government in each case.”

These articles contain all the provisions of the treaty, respecting the duties and powers of the commissioners.

The act of Congress of 12th June, 1840, “to carry into effect” said treaty, provided for the appointment of two com-

missioners on the part of the United States, who, with two others on the part of Mexico, "shall form a board, whose duty it shall be to receive and examine all claims provided for by the convention, and to decide thereon according to the provisions of the said convention and the principles of justice, equity, and the laws of nations."

The American commissioners, Mr. Marcy and Mr. Rowan, (and afterwards Mr. Marcy and Mr. Breckenridge,) allowed interest (at the same rate as was allowed by the Florida judges in their decrees) in all cases of injuries arising from loss or destruction of property; and the umpire, Baron Roenne, allowed the interest, in all cases. Indeed, it is not understood that the Mexican commissioners objected to such allowance.

I append to this opinion one other paper which contains an opinion of the Attorney General of the United States on a private claim. It is the case of Mrs. O'Sullivan, and may be found at page 1115 of the opinions of the Attorney General.

The rule of damages, adopted by the courts in Florida, was laid down by Judge Reid, in the first decision awarding interest, in these words, viz.:

"I am required by the statute to receive, examine, and *adjudge*, these claims for losses. In performing this duty I have allowed, because it seemed to me just and equitable to allow it, *interest* upon the amount or value of property ascertained to have been lost. The rate of interest existing in the province at that time (1812 and 1813) was five per cent., and this is the sum allowed in all cases. I am sensible that this allowance will swell considerably the amount to be paid to the claimants, but I do not perceive how it could be avoided. If we lose sight of the national character of one of the parties, and suppose two private persons engaged in a dispute about an injury to property, the tribunal to which resort is had, in adjusting the damages due by the one to the other, will consider the value of the property destroyed, in connection with the time for which the owner has been deprived of the use and enjoyment of his property. The first being ascertained in money, a compensation for the last may best be regulated by reverting to the rate of interest allowed by the law of the country where the wrong was done."

If the opinions which I have expressed, and attempted to support, are sound, and well founded, then this rule, adopted by the court, is exactly the rule which they are bound to adopt, and the only rule which they could adopt, without manifest disregard of the principles of public law.

It may, probably, be thought, that some of the opinions which I have expressed in this paper, are more or less in conflict with opinions which have been given, in these cases, by recent Attorneys General of the United States, Mr. Crittenden, Mr. Legaré, and Mr. Nelson. Perhaps, however, the differences may be rather apparent, than real, as the questions appear to have been submitted, and their opinions given, without particular reference to the terms of the treaty, or those authorities of public law, which, in my judgment, rule the case. On the whole, I am prepared to answer the questions proposed to me; and my opinion clearly is:

I. That the provisions of the treaty require the losses or injuries for which satisfaction is provided, to be established judicially; and that the decrees of the judges as to the amount or extent of said losses or injuries, as to cases within the treaty, are final.

II. That the measure or rule of satisfaction adopted and applied by the judges, in these cases, namely, to add to the value of the property at the time of its loss, interest, as a compensation for the loss or deprivation of its use, or as covering the necessary and immediate consequences of the original injury, is in accordance with the laws and usages of nations, and ought, undoubtedly, to be allowed and paid by the Secretary of the Treasury, under the acts of Congress already cited.

DANIEL WEBSTER.¹

¹ Appended to the pamphlet are extracts from the remarks of the American Commissioner, Mr. Langdon Cheves, and the opinion of the Attorney General of the United States in the case of Mrs. O'Sullivan, referred to by Mr. Webster on pp. 423-424 of this volume.

Opinion on the Claim of the Union Land Company against Mexico¹

AN association of individuals, called the Union Land Company, being citizens of the United States, have a claim against the Gov^t of Mexico.

These claims are founded on certain grants of land, in Texas, made in 1826 & 1829, under the authority of the American Gov^t, on certain conditions of colonization & settlement. They are legal & valid grants as the claimants insist, under the laws of Mexico & Texas, as those laws existed at the time. The settlement & colonization were undertaken, in pursuance of the condition of the grant; & large sums of money had been expended, when Mexico, owing to some change of policy, or change of circumstances, broke up the settlement, drove off the colonists, & deprived the grantees of all the property, which they had invested in the undertaking.

The laws & public acts of Mexico had expressly & urgently invited foreigners to take up & settle lands in Texas, & pledged the faith of the Gov^t in the fullest manner, to their security & protection, & the preservation of all their rights. This breach of public faith, & this wanton destruction of their property, induced the grantees to apply to their own Gov^t requesting it to insist on redress from Mexico. The Gov^t of the United States deemed it a case, proper for its interference, as the grantees were its citizens, and as they had entered into the undertaking, on the plighted faith of Mexico.

It is well known, that a Convention was concluded between the United States & Mexico, on the 11th of April, 1839, in which it was stipulated, among other things, that all claims of

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society. It bears no date.

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citizens of the United States upon the Mexican Govt in behalf of which the interposition of the Govt of the United States had been solicited, should be referred to four Commissioners, two to be appointed on the part of the United States, & two on the part of Mexico. And it was further provided, that if the Commissioners should differ, in relation to claims, they should draw up a report, stating the points of difference, & the grounds of their respective opinions, and these reports were to be referred to an umpire, to be appointed by the King of Prussia. Commissioners were accordingly appointed, by both parties, & an umpire by the King of Prussia. The Commission met in Washington, & went thr^o the term limited for its duration. The claim of the Union Land Company was presented to this Board. The Commissioners of the two Countries differed, in regard to it; the American Commissioners adjudicating in its favor, & the Mexican Commissioners against. It may be proper to observe here, that after the allowance of two or three unimportant or not very considerable cases, the Mexican Commissioners uniformly rejected all claims, whatever; so that nothing was finally disposed of, except cases upon which the Umpire had finally acted. It does not appear, that the Mexican Commissioners denied that this was a claim of a valid nature, against Mexico, & therefore within the Convention of 1839 if the facts were established; but they questioned the sufficiency of the proofs. The case, therefore, like the other cases, went to the Umpire; but, unfortunately, the report of the respective Commissioners was placed in his hands, at so late a period, that he could not examine it before the period expired, during which the Commission was to last. The papers therefore were returned, & the case left, without final adjudication & decision. An elaborate report, in favor of the claim, was drawn up by Mr. Breckenridge, one of the American Commissioners; in which the facts of the case are stated, & the principles supposed to be applicable to it fully discussed.

Before the presentment of the claim, the claimants had assigned it to R. S. Coxe Esq. on certain trusts, set forth in the deed of assignment, & the claim was presented in his name.

The Govt of the United States having originally interposed in favor of this claim, & the American Commissioners having

pronounced it to be just & well founded, & accidental circumstances alone having as is supposed prevented its final allowance, it remains as a continuing subject of demand on Mexico, and it is believed that the United States minister in Mexico has rec'd instructions, to propose immediately, a new Convention, embracing this & other cases. It is understood, that in the view of the American Gov^t the question in this case is resolved into an inquiry as to the soundness & justice of the objections to its allowance, which were presented by the Mexican Commissioners. Every thing else the Gov^t of the United States regards as settled.

Of these objections, presented on the part of Mexico, there is but one, which merits any consideration, & that is founded on the 11th section of the law of Mexico, of April 1st 1830. Now it is evident, that whatever may have been the provisions of this law, it could not abrogate grants, which had been lawfully made in 1826 & 1829. The only question is, were the grants lawful, when made; & that, the Mexican Commissioners do not appear to deny.

But the objection, standing on the law of April, 1830, may receive another answer. That objection arises in this way. By a law of the 18 of August, 1824, Mexico guarantied to foreigners, who should come to establish themselves within her territory security to their persons & property, on condition that they be subject to the laws of the Country; and the same law authorizes the several States to make regulations, for colonization within its limits. But the law contains a provision by which Mexico may prohibit, by law, the entrance of foreigners, under imperious circumstances. The State of Coahuila & Mexico, proceeded, under the authority of this law of the general Congress of Mexico, to enact & establish its regulations for colonization; and by these regulations, & various acts of Government, fully recognized the contracts, in which this present claim originated. But in the mean time, viz. in April, 1830, the Gen^l Gov^t of Mexico under the provision, or reservation in the act of Aug. 1824, passed an act prohibiting citizens of foreign countries, lying adjacent to the Mexican territory from settling, as colonists, in the States or territories, adjoining such countries, & suspends contracts, not executed,

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& opposed to this enactment. It is not necessary to consider whether the Mexican Gov^t could suspend, or abrogate these contracts, entered into so long before the act of 1830, & at a time when they were perfectly lawful. If, by a sort of *ex post facto* legislation, Mexico has annulled valuable & lawful contracts, entered into between herself & citizens of the United States, it is only the more clear that she is bound to make indemnity, & the more certain that the Gov^t of the United States will insist on such indemnity.

But there is still another answer. The Emigrants who were proceeding to Texas to establish themselves as colonists under the grants in question, were not citizens of the United States, but Germans, Swiss, French, English & Irish, so that the law of 1830 could have no application to them whatever.

This objection of the Mexican Commissioners, the only one that bears any semblance even of plausibility is fully considered, & answered, by the American Commissioners, from whose decision, or judgments, I have extracted what they say on this point; & the extract accompanies this opinion.

On the whole, I do not perceive any just objection to this claim, even upon the principles which the Mexican Commissioners themselves recognize; and I entertain no doubt whatever that the Gov^t of the United States will feel itself bound to bring the matter, as speedily as possible, to a final decision.

It has already been observed, that before the presentment of this claim, it had been assigned to R. S. Coxe, on certain trusts, & was presented in his name. It would seem, that at a subsequent period, some alterations were made as to the trusts, uses, or purposes of the assignment; & when the conveyances were completed, Mr. Coxe, the Trustee, issued certificates in pursuance of the trust, in the form attached hereunto.

It is quite clear that by issuing these Certificates, Mr. Coxe becomes amenable to any holder for a *pro rata* part of whatever may be rec^d on account of the claim.

It is quite clear, also, that the original assignors cannot interfere, by bill in Equity, allegations of every, or any other means, between Mr. Coxe & the holder of this scrip, to enjoin or prevent him from paying the proceeds, when rec^d according to his contracts.

These points have been fully decided, in similar cases, by the Supreme Court of the United States.

There are two others to which my attention has been called ; viz. that of the Trinity Land Co., & that of G. L. Thompson & others. These claims have also been assigned to Mr. Coxe, in trust, & certificates in like manner have been issued by him.

The difference between these claims & that of the Union Land Company ; is that the former was examined, & adjudged valid by the American Commissioners ; while the latter were not examined, for want of time. From the memorials & the evidence in the respective cases, they all appear to stand essentially on the same ground, except that these last mentioned cases appear to be relieved from the principal objection urged by the Mexican Commissioners against that of the Union Land Company, since to them, the act of Mexico of April 1830 is not applicable.

Blockade Opinion

THIS opinion by Mr. Webster shows that it was given for the guidance of an individual, probably a shipowner, in the conduct of his business. The opinion refers to the following authorities which, on examination, fully sustain the conclusion reached. The *Betsey*, 1 Rob. Chr. 332; The *Vrow Johanna*, 2 id. 109; The *Nep-tunus*, id. 110, 114; The *Little William*, 1 Acton, P. C. 141, 161.

The general rule is that notice of a Blockade, derived either from official proclamation, or public notoriety, is sufficient; & that after such notice the neutral vessel cannot proceed to the mouth of the River, or to the port, under the pretence of inquiring, there, whether the Blockade has not been raised. This rule however is ordinarily relaxed, in favor of remote parties. In the late war between England & France, ships sailing from America after knowledge of a blockade might still proceed with a contingent destination for the blockaded port, with the purpose of calling at some neutral place for information. But I believe it has never been allowed to proceed to the very mouth of the harbor, & there to inquire whether the Blockade exists, after receiving formal and official notice at home. My opinion is, that this vessel may proceed on her voyage, with a contingent destination to Buenos Ayres, if she shall find the Blockade raised, but that in order to ascertain this, it will [be] her duty to make inquiry at some proper place, on her way, & not to proceed into the River, with the purpose of prosecuting her voyage till she shall be turned back by the Blockading squadron.

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society. It is without date.

Instructions Regarding the Case of John Henderson

[MARCH, 1851.¹]

ACCORDING to the laws of the United States, every indictment or prosecution for a criminal offence, must be tried by a Jury; this Jury consists of twelve persons, and the law requires they should all agree in pronouncing the person accused, guilty, before sentence can be passed upon him. Our Laws also provide, that before any man can be sworn as a member of the Jury, he must declare on oath, that he has an impartial mind, and that he has made up no opinion, on the question of the guilt or innocence of the person accused.

When the acts, which are supposed to constitute the guilt are public and notorious, and the case is one which attracts a good deal of attention, it sometimes happens, that an impartial Jury, that is to say, a Jury composed of those who have formed no opinion upon the subject, is with difficulty to be had, in that particular part of the country.

Hence an authority is usually vested in the Courts, when such a case arises, to change the trial to another place, so that Jurors may be selected from another community. But it so happens that in this case, no such power exists.

That three trials of John Henderson should be had, and that neither of them should result, either in his acquittal or conviction, is greatly to be regretted. The government has incurred large expenses, in the attempt to vindicate the laws, as well

¹ From a manuscript, not in Mr. Webster's handwriting, but containing corrections in his hand, in the New Hampshire Historical Society. Endorsed "To Dist. Atty., Miss. Trial of John Henderson." It bears no date but is placed as March, 1851, in the New Hampshire Historical Society Collection.

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from a regard of what was thought due to its own dignity, as from a desire that none of the citizens of the U. States should violate their neutral duties with impunity. If John Henderson had been indicted for treason against the United States, or for other high crime or misdemeanor his trial must have proceeded in the same way, and might have been embarrassed and a conviction or acquittal defeated by the same causes, the operation of which has prevented a verdict and judgment in the recent prosecution.

Opinion on the Erie Canal Act

[APRIL 11, 1851.]¹

DOUBTS having been suggested of the Constitutional power of the Legislature of the State of New York to pass a Bill, now pending before it, entitled "An act to provide for the Completion of the Erie Canal enlargement, & the Genesee Valley, & Black River Canals," my opinion on that point has been requested.

The first question, I presume, is, whether by this Bill, should it pass into a law, that a debt would be contracted, by or on behalf of the State of New York, against the prohibition contained in the 12 Section of the 7th Article of the Constitution of that State. That Section declares, that "no debt shall be hereafter contracted by or in behalf of this State," unless for some single object, &c. & unless its reimbursement be provided for by a direct tax, &c. — None of these conditions, or others made necessary by the Section, in order to render a law for the creation of a debt valid, are contained in this Bill; so that the sole question, so far as respects this part of the Constitution, is simply, this; does this Bill authorize the contracting of a debt, by, or on behalf of, the State.

To contract a debt, is, in the general sense of the phrase, to incur a liability for the payment of money. This liability may be absolute, or conditional; it may be accompanied by the joint liability of others, or it may rest on one, alone; & it

¹ From the draft, in Mr. Webster's handwriting, in the New Hampshire Historical Society. The date has been endorsed by another hand. On the back of the paper is the following letter to Fletcher Webster in Mr. Webster's handwriting:

MY DEAR SON; — Pray copy this, in a fair hand, & be here with it, by 7 or 8 o'clock —

I am tired, writing all day, — thank you for 4 of them.

D. W.

may, or it may not, be secured, by pledges, hypothecations, or other collateral assurances. And in this general sense the Constitution of the State of New York is to be understood, in this third Section of the seventh article; because when the Constitution of a State gives the Legislature of such State an authority to contract debts, or imposes restraints on such authority, there cannot well be any doubt of what is meant by the use of the terms. The Legislature of a State, except so far as Constitutional prohibitions may prevent, may control & dispose of the property, income, & revenues of the State, & apply them to public objects, in its discretion; and it may authorise loans, or contract debts, for proper objects. But the contracting of debts, by the Legislature, for such objects, may be restrained, or prohibited; & by the Constitution of N. Y. it is prohibited, except under limitations, & conditions which this Bill does not provide for. Does this Bill, then propose to create a debt? In other words, will certificates, provided for in it establish an obligation against the State of New York, constituting a debt, within the just interpretation of the prohibition of the Constitution. I think not. I think the certificates will amount to a transfer, assignment, or anticipation of certain revenues, & nothing more. If the provision of the Bill be clear, as it seems to me it is clear, that the Certificates shall be received, at the sole hazard of the receiver or his assigns, without any obligation on the part of the State, direct or indirect, in law or Equity to make any other provision for the repayment of the sums which may be advanced, I do not think the transaction amounts to the contracting of a debt, within the prohibition of the Constitution.

The second question arises, under the third Section of the same 7th Article.

The important words are: "The surplus revenues shall in each fiscal year be applied as the Legislature shall direct to the Completion of the Erie Canal Enlargement, & the Genesee Valley & Black River Canals, until they shall be completed."

I had, at first, some difficulty with this clause, from an apprehension, that it might be supposed, that these words make it imperative on the Legislature to perform the legal act

of application, in each fiscal year, successively ; but I am persuaded that that view is too narrow, & cannot be sustained. The actual application of the money to its use, not the legal declaration of the use, is the thing to be done, in each fiscal year. That is to say, the Legislature in its discretion, is to make proper provisions & may make them beforehand for the application of the surplus revenues, as they arise from year to year, & become ascertained, to the object to which they are destined. The Legislature has, & should have, a reasonable latitude of discretion, in the execution of this trust. It may select one of the three objects to be first accomplished, & then another to be second, postponing the third ; or it may provide for carrying them all on, simultaneously. All this depends on its own enlightened judgment of what the public good requires. One can hardly see how any judicious & economical execution of this authority by the Legislature could be performed, without previous contracts & stipulations, for the doing of the work, on one hand, & the payments out of the fund, on the other. All such stipulations for future payments, would be anticipations, or legal regulations, in advance ; & I consider the provisions of this Bill to amount to no more.

I am of opinion, therefore, on the whole, that the Bill is not, in any of its provisions, repugnant to the Constitution of New York.

Argument in the Goodyear Rubber Case

UNITED STATES CIRCUIT COURT, March, 1852.¹

THIS suit was brought by Charles Goodyear, against Horace H. Day, to obtain a perpetual injunction against the violation of his patents of 1839 and 1849 granted for the original and first invention of Vulcanized Rubber. The case was called in the U. S. Circuit Court for the District of New Jersey on March 23, 1852, Brady & Webster for the plaintiff, Choate & Cutting, for the defendant.

Mr. Cutting, having concluded his argument, Mr. Webster addressed the Court as follows :

If I should detain the Court by the part which I have to perform in this discussion for any great length of time, I hope the Court will believe that what I have to say is long, only because I have not had time to make it short.

There are many topics in this cause calling for particular observation. I will discuss them with all practical brevity.

I shall not attempt to follow my learned friend, who made his address yesterday, step by step in his very thorough detail of the matter in controversy in all its aspects and in all its bearings. This is a patent cause of considerable interest; one which will be found at last to involve no great difficulty in principle, but which does involve a great amount of property, and does largely affect the interests and pursuits of a great number of individuals.

¹ "Speech of the Hon. Daniel Webster in the Great India Rubber Suit, Heard at Trenton, New Jersey, in March, 1852, in the Circuit Court of the United States, before the Hon. Robert C. Grier, and Philemon Dickerson, Judges of that Court, Charles Goodyear being Plaintiff and Horace H. Day, Defendant. Reported by Arthur Cannon, of Phila., Phographic Reporter. New York: Arthur & Burnett, Stationers and Printers, MDCCCLII."

I am happy that I am able to say, that the discussions in this court have been conducted entirely in that spirit, and with that decorum, which should ever be exhibited by able and intelligent members of the bar, when they are considering questions of great importance. If, indeed, there has sometimes come up from this record an evil odor, that perfumery found its way upon the record before it came into this Court.

It is provided in the Constitution of the United States, that Congress shall have power to promote the progress of science and the useful arts by securing for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The law acknowledges the existence of the right of an inventor to his invention as property, and the Constitution is remarkably exact in the language in which it speaks of this important subject. The Constitution does not attempt to *give* an inventor a right to his invention, or to an author a right to his literary productions. No such thing. But the Constitution *recognizes* an original, pre-existing, inherent right of property in the invention, and authorizes Congress to secure to inventors the enjoyment of that right. But the right existed before the Constitution and above the Constitution, and is, as a natural right, more clear than that which a man can assert in almost any other kind of property. What a man earns by thought, study and care, is as much his own, as what he obtains by his hands. It is said that, by the natural law, the son has no right to inherit the estate of his father — or to take it by devise. But the natural law gives a man a right to his own acquisitions, as in the case of securing a quadruped, a bird, or a fish by his skill, industry, or perseverance. Invention, as a right of property, stands higher than inheritance or devise, because *it is personal earning*. It is more like acquisitions by the original right of nature. In all these there is an effort of mind as well as muscular strength.

Upon acknowledged principles, rights acquired by invention stand on plainer principles of natural law than most other rights of property. Blackstone, and every other able writer on public law, thus regards this natural right and asserts man's title to his own invention or earnings.

The right of an inventor to his invention is no monopoly.

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It is no monopoly in any other sense than as a man's own house is a monopoly. A monopoly, as it was understood in the ancient law, was a grant of the right to buy, sell, or carry on some particular trade, conferred on one of the king's subjects to the exclusion of all the rest. Such a monopoly is unjust. But a man's right to his own invention is a very different matter. It is no more a monopoly for him to possess that, than to possess his own homestead.

But there is one remarkable difference in the two cases, which is this, that property in a man's own invention presents the only case where he is made to pay for the exclusive enjoyment of his own. For by law the permission so to enjoy the invention for a certain number of years is granted, on the condition that, at the expiration of the patent, the invention shall belong to the public. Not so with houses; not so with lands; nothing is paid for them, except the usual amount of taxation; but for the right to use his own, which the natural law gives him, the inventor as we have just seen, pays an enormous price. Yet there is a clamor out of doors, calculated to debauch the public mind.

But a better feeling begins to prevail. A more intelligent estimate of this species of property begins to spring up. Yet I am sorry to say, that there have been men — there still are some men in the community, who would not do an immoral action, who would not for their lives, "pick a flaw" in their neighbor's title-deed, and who yet make no scruple of endeavoring by every means in their power to "pick a flaw" in his patent. That feeling is unjust, illegal, and unsocial.

Now, may it please your Honors, this patent cause is founded on two patents issued by the Government to Charles Goodyear, one in 1839, and the other in 1849, for a process of manufacturing India Rubber. The history of that natural product has not been much known till lately. It is a gum procured from an equatorial tree, found in greater or less quantities in Brazil, and called by botanists *Ficus Elasticus*. The natural history of the tree is not uninteresting. It is said to be in some of its specimens, the largest tree growing on the face of the earth. There are instances, in which it is described as being nearly a hundred feet in circumference. It runs up forty, fifty, or

sixty feet, without branches, then ascends to a hundred or a hundred and fifty feet, and is crowned or tufted with rich foliage. The leaves are thick and long, six or seven inches in length. The Indians procure the gum by incision in the tree, after the manner in which sap is obtained from the maple, in the Northern and Middle States. When the gum exudes from the tree, it is of a milk color, and of the consistency of honey. Unless it be speedily submitted to some process, it coagulates, and therefore, when the Indians have obtained it in the morning, they apply it the same day, layer after layer, on forms of clay, or lasts. Then they dry it in the smoke of a fire, made of a peculiar nut ; thus not only drying it, but imparting to it the dark color which it has, when we receive it here in the shape of balls, bottles, or shoes.

It would appear, that it was first introduced into Europe, by scientific French travellers, in 1736. In France they analyzed it, but without any profitable result. Dr. Priestly says, that about the year 1791, he saw a specimen of the gum at a stationer's where it was used to erase pencil marks. From that use it derived the common and erroneous name of India rubber. It was first known in this country about the year 1820.

In 1823, five hundred pair of shoes were imported into this country, and sold at Boston. At a somewhat later date, it became the subject of scientific investigation, and Dr. Comstock, of Hartford, Conn., obtained in 1828 or 1829, a patent for dissolving it in turpentine, so as to make it plastic, and adapt it for being spread on cloth. Dr. Howe attempted to manufacture India Rubber in New York, in 1829.

The considerable manufacture of it commenced within the recollection of some of us, in New England, in Massachusetts, and Rhode Island. I think it was in the year 1832, the Roxbury factory commenced its operations. It was incorporated in 1833.

Among a people seeking every avenue for every successful enterprise, the apparent prosperity of this company was sufficient encouragement to embark in its manufacture. Accordingly numerous manufactories were in operation in 1834, 1835, and 1836. But these all failed with but one exception. In 1837 and 1838, the business of manufacturing India Rubber

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was abandoned, except by Governor Jackson, and Dr. Harts-horne of Providence, who carried on business under patents, which had been obtained by Mr. Goodyear, until his invention of the vulcanizing process superseded his previous inventions, and drove them, or their successors, out of the business, where-upon they adopted the new invention, and purchased a license from Goodyear. And, may it please your Honors, all these factories, all the earnings of individuals connected with the business, came to an end, and nothing was done until the business was revived by Goodyear's great invention of vulcanizing.

Now upon every principle of law, upon every rule of right, all these prior inventions became non-entities — they gave no man any right to anything except the sulphur invention of Hayward, patented in 1839. All the rest were airy nothings ; they all fell to the ground ; the public derived no benefit from them. That established fact proved not only that there had been at that time nothing done approaching Goodyear's invention, but nothing producing a beneficial result. These various factories, with all that was done by Collins & Stoddart, and Pratt, and the whole of them came to nothing ; they gave up their business ; and the whole concern of manufacturing India Rubber came to an end.

Now, may it please your Honors, it appears from the evidence in this cause, that Charles Goodyear, in the year 1834, came into the field of operations in the manufacture of India Rubber.

I am sorry to say the defendant went altogether out of his way in his answer to say that Goodyear, having failed in his business as a hardware merchant, threw himself into the Rubber business as a sort of refuge. What particular weight that has in its bearing on this case, I have not yet learned. I am happy to observe that this odious statement in the answer did not receive notice from my brethren of the bar — the opposing counsel ; they would not defile their mouths by uttering it.

In 1834, Charles Goodyear turned his attention to the rubber manufacture. Whatever may be Mr. Goodyear's claims to the great invention, now spread out to the ends of the earth, and known to all the world, this records shows, other records

show, everybody knows, that he is a man of an inquisitive, ingenious, laborious turn of mind.

He turned his attention to this subject, not as a matter of business or trade, but by way of commencing and carrying on a series of experiments, by which he could bring to the test the question, whether this very extraordinary substance was capable of rendering any benefit to society, to see whether there was any way given among men skilled in the arts, by which the article could be cleared of its stickiness, its gluey nature, its tendency to harden in the frost and soften in the heat; for it is well known that the articles manufactured up to the year 1834 were entirely useless; if they were exposed to the sun, they became sticky; you could not separate them after their surfaces came in contact; and if exposed to the cold they became hard and rigid. I well remember that I had some experience in this matter myself. A friend in New York sent me a very fine cloak of India Rubber, and a hat of the same material. I did not succeed very well with them. I took the cloak one day and set it out in the cold. It stood very well by itself. I surmounted it with the hat, and many persons passing by supposed they saw standing by the porch, the Farmer of Marshfield.

Charles Goodyear began his experiments at Philadelphia. When he left that place, his wanderings began. In the spring of 1835, he removed to New York; in the summer of 1836, he went to New Haven; in the spring of 1837, to Staten Island; in the fall of 1837, he visited the almost deserted factory at Roxbury. In the summer or fall of 1838, he went to Woburn, where Hayward was trying experiments with sulphur. Here Goodyear bought the Sulphur Patent, and hired Hayward to assist him in his operations, and work for him a year. He went on with his experiments, and within four or five months, that is to say, in January, 1839, he made his elementary discovery of metallic or vulcanized rubber. In the fall of 1839, he carried on experiments at Lynn; and in like manner at Roxbury, in 1840. But keeping up his experiments, nevertheless, at Woburn, where his family lived. In the fall of 1840, he went to Northampton; in 1841, he removed to Springfield. His experiments were still going on at Woburn; as Hayward

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had come into his employment again for one year, from April, 1841.

At Springfield, Goodyear continued his experiments, till he had so far perfected his invention, as to apply for a patent. This was in January, 1844. He then went to Naugatuck, in Connecticut, and started a factory. It would be but painful to speak of his extreme want — the destitution of his family, half clad, he picking up with his own hands, little billets of wood from the wayside, to warm the household — suffering reproach — not harsh reproach, for no one could bestow that upon him — receiving indignation and ridicule from his friends. Here is a letter, written in a good spirit, and cheerful vein, but particularly affecting from that circumstance.

It was written from the Debtor's Jail, in Boston. This is it. I will read it.

DEBTOR'S PRISON, April 21, 1840.

MR. JOHN HASKINS OF LUKE BALDWIN,

GENTLEMEN, — I have the pleasure to invite you to call and see me at my lodgings, on matters of business, and to communicate with my family, and possibly to establish an India Rubber Factory for myself, on the spot. Do not fail to call on receipt of this, as I feel some anxiety on account of my family. My father will probably arrange my affairs in relation to this Hotel, which, after all, is perhaps as good a resting place as any this side the grave.

Yours truly,

CHARLES GOODYEAR.

He says it is as good a lodging as he may expect this side the grave; he hopes his friends will come and see him on the subject of India Rubber manufacture; and then he speaks of his family and of his wife. He had but two objects, his family and his discovery. In all his distress, and in all his trials, she was willing to participate in his sufferings, and endure everything, and hope everything; she was willing to be poor; she was willing to go to prison, if it was necessary, when he went to prison; she was willing to share with him everything, and that was his only solace.

May it please your Honors, there is nothing upon earth that can compare with the faithful attachment of a wife; no creature who for the object of her love, is so indomitable, so per-

severing, so ready to suffer and to die. Under the most depressing circumstances, woman's weakness becomes mighty power; her timidity becomes fearless courage; all her shrinking and sinking passes away, and her spirit acquires the firmness of marble — adamantine firmness, when circumstances drive her to put forth all her energies under the inspiration of her affections.

Mr. Goodyear survived all this, and I am sure that he would go through the same suffering ten times again for the same consolation. He carried on his experiments perseveringly and with success, and obtained a patent in 1844 for his great invention. With your Honors' permission, before I proceed to prove the originality of that invention and the validity of the patent, I will pay some respect to the argument of the counsel on the other side. I shall relieve your Honors of a feeling of regret, and even distress, inflicted upon you by the powerful sympathy exerted by Mr. Choate, my friend and counsel on the other side in this case, for the unhappy condition, the melancholy and depressed circumstances into which Mr. Day has been brought by his unfortunate and miserable connection with Mr. Goodyear.

There is no man who gives more impression to common sayings than my brother Choate; — no one who exceeds him in powers of expression, or who draws pictures like him.

Mr. Choate, in the pathetic speech he uttered so affectingly, described Day as a *deluded victim* to whom Goodyear had promised to afford protection, but gave such protection as the vulture gives the lamb, covering and devouring.

Then he alleged that Goodyear wished to revive Day a little, felt his pulse to see if some trembling motion of life could not be discovered, that he might submit the victim to the pangs of another death and once more gloat over his sufferings. Descending from this region of fancy, he said that Goodyear had sold Day a license, and wresting from him all its benefits, had injured him as much as if he had burned his factory to the ground. He said that Day had squandered his fortune for the privilege of making shirred goods, under Goodyear's patents, and received nothing in return.

Now all these touching observations would, I think, be very

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effective but for thing. The counsel have not thought it worth while to offer a particle of evidence to sustain these assertions; *not one particle.*

These observations are, I admit, very eloquent, very pathetic, very beautiful, but for one drawback. I am reminded of a maxim of the French rhetoricians, which I wish was better known and more regarded, that nothing is beautiful that is not true. Truth is the cynosure of eloquence, and pathos is of but little value further than it is analogous to reality, for there is no beauty when there is no truth.

Now it is true that Mr. Day is the proprietor of the Solis Patent—so called. Mr. Day owns that patent himself. It is said that he bought it of the owner to protect himself, and I refer your Honors to the testimony of Mr. Ward; of which abstracts will be presented to the court. Day says he purchased Solis's Patent to protect himself in the shirred goods monopoly. When, therefore, his business was utterly ruined he purchased more ruin; in the lowest deep he plunged deeper still.

The truth is, may it please your Honors, that Day bought Solis's Patent to make one particular article under it, and that is gores for Congress boots, the manufacture of which was no infringement of Goodyear's Patent.

It may be well to explain the difference between the shirred goods made by Goodyear's Patent, and the goods made by Solis's Patent. In making goods under the Solis Patent the cords are not stretched, the elasticity is obtained from the cotton fabric used in the manufacture of those goods. The rubber was used merely to contract the goods after they had been in a state of tension. In the one case the elasticity is obtained from the cotton goods merely, and in the other from the rubber. This is well explained in the testimony of Mr. William Ward, the defendant's witness. Vol. IV, Defendant's proof, page 391, question 40.

Now Mr. Goodyear's Patent proceeded on an entirely different idea. He applied the rubber strands or cords, which are themselves extended or stretched, and in that state put on the cloth, or between the two laminæ. Then the tension of the cords being released, they returned to their original length, and in that

process contract or corrugate the cloth. The elasticity is thus obtained for the goods, directly from the rubber cords. The cloth may be drawn back to its original length, and the strands expand as far as the original length of the cloth.

But, departing from this, I will show that Mr. Day suffered very little, if anything, from the competition created and carried on under Solis's Patent. It would seem to be clear from the obligations of the parties, in the covenants of October and November 1846, that Goodyear was answerable, for loss and injury, during the time of that competition as to shirred goods, which he covenanted to protect Day against, and in that covenant, there was a provision, that when that competition ceased, Day should become answerable again for his tariff.

Mr. Webster then analyzed Day's claim of injury and the evidence relating thereto.

Now it is not necessary to prove the originality of that invention, or that there has been a lawful patent for it granted to Goodyear. The answer as to this point admits all that is necessary. Goodyear purchased the invention and took a patent for it in his own name. It became his private property upon which he sought to carry on his experiments and inventions, and to accomplish his great work. The answer admits this. Why then is there any dispute about it? Why should we call witnesses to prove that which is not denied? I suppose that it is a universal rule in Equity, which is much more precise in this respect, than at Law, that every plaintiff must recover and every defendant must defend, according to what is alleged in the answer or the bill. In other words both parties must conform the *probata* to the *allegata*; for one thing cannot be said and another proved, nor can one thing be proved and another said, and so far as Hayward's Patent is concerned there is no necessity for our sustaining it by argument or proof.

The Patent of 1839 is for sulphur and rubber alone. Now, on the existing state of facts displayed upon this record, does it appear, that the combination of sulphur and rubber alone was patentable as a compound? There can be no doubt about that. Suppose, then, sulphur was known as one of the ingredients of a

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compound, rubber as another, white lead as another, and litharge and lampblack as others. Suppose they were all used more or less. Now, I take it that when there are so many substances sometimes used and sometimes not used in forming a combination for a particular purpose, it is competent to select two of the substances and reject the rest, taking a patent for a combination of the two alone. That is clear, because the inventor may have discovered that the former combination in the art was rendered useless by the presence of some superfluous ingredients ; and this invention may be the result of diverging so far from common practice and common use, as to leave out one or more of the ingredients and go for a patentable combination of two and only two. I suppose that if there are compounds in which three, four, five, or ten ingredients are used, and yet the manufacture be still imperfect, any inventor who adds another ingredient and increases the number of ingredients, may have a patent for that compound if it be a thing not known or practised before. Well, for the same reason, if out of the general number of things, ordinarily used to make a compound, instead of adding a new ingredient, he strikes out a known ingredient, and for a good reason, makes a compound of two, and they turn out to be useful, then he may have a patent. There is no doubt, therefore, if it were necessary to argue the matter, that the patent for Hayward's invention is a valid patent.

But it is said that Hayward's invention, was dedicated to the public. That is a very common defense, whenever it occurs in the progress of manufactures that a particular improvement takes time, and experiment and thought, to perfect it.

Mr. Webster then considered this defence upon the evidence.

We have reached that point in this discussion where the great question of the case rises up before us. We meet it. We are bound to meet it. And that great question is, the truth or falsity of the claim by Charles Goodyear to the invention of the process of vulcanizing India Rubber. Did he make such an invention? Is he who sits here before us the man known now, and to be known forever, while the history of art remains, as the individual who introduced,

to the knowledge of his country, and to the knowledge of the whole civilized world, this extraordinary phenomenon? It is a phenomenon. My knowledge of physics is not great; I am no philosopher, not being willing to live quite so abstemiously and poverty stricken as Mr. Goodyear, because I have not been inspired with the same ambition; and I have given my attention through life to objects a little more practical. But when the nature of this manufacture first came to my knowledge, I thought that, so far as my observation had gone, I knew of but one thing in the whole world analogous to it.

The great peculiarity of this vulcanizing process is this. If you take a compound of sulphur and rubber in a dry state, and grind and mix them together, and apply heat, the consequence is, that the substance softens, and softens, and softens, as the degree of heat increases, until it reaches a certain height in the thermometer, say 212° Fahrenheit, or along there, a little more or less. Anybody who ever tried the effect to see what would be its operation upon this compound, and found that a considerable degree of heat softened and rendered it more and more plastic, as the degree of heat was augmented, would naturally be of opinion, that if that heat were carried still higher, the whole substance would melt. I say that everybody would be of that opinion, reasoning *a priori*, and founding his conclusions upon a general knowledge of the effect of heat. But Mr. Goodyear, as the result of untiring experiment, found out, that although the application of heat produced a melting effect upon this compound, rendering it more and more plastic and soft, as the degree of heat augmented, yet when that heat, going on, had got up to a certain much higher degree, its effect was the reverse of what it had been, and then the rubber composition commenced to vulcanize and harden, in fact to make metallic, the vegetable substance. I think that is extraordinary: and I know of no operation of nature exactly like it. But that which is in some degree analogous to it, is what chemists call the anomalous expansion of water. All know that the general effect of heat upon natural substances is to make them expand; and the general effect of cold upon natural substances is to make them contract. Just the reverse is it with water. When water freezes into ice, the ice

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becomes lighter than an equal mass of water. It is specifically lighter than the water. It swims on the water. It has been supposed, and perhaps not erroneously, that the departure, in this instance, from the ordinary course of nature, is an effect dependent upon a final cause. And that is, that when the water freezes, it should make a natural bridge to protect the flowing waters beneath, and let men and animals pass over the bridge. Because everybody sees, that if the general law of nature operated in this case, and water by becoming frozen into ice became more compact and solid than the water, it would sink to the bottom, and there, especially in cold climates, would prevent the flow of the stream, and obstruct and put an end to it. Therefore such a reverse process has a good deal of resemblance, or is analogous to this vulcanizing process. Water freezes into ice at 32° . You may make it much colder, and if you expose it to a much lower temperature, the cold ceases to expand, and begins to contract; and you may freeze ice, so that it will sink in water. And it has been supposed the formation of anchor ice, which goes to the bottom, is produced by this increase of cold.

And now is Charles Goodyear the discoverer of this invention of vulcanized rubber? Is he the first man upon whose mind the idea ever flashed, or to whose intelligence the fact ever was disclosed, that by carrying heat to a certain height it would cease to render plastic the India Rubber, and begin to harden and metallize it? Is there a man in the world who found out that fact before Charles Goodyear? Who is he? Where is he? On what continent does he live? Who has heard of him? What books treat of him? What man among all the men on earth has seen him, known him, or named him? Yet it is certain that this discovery has been made. It is certain that it exists. It is certain that it is now a matter of common knowledge all over the civilized world. It is certain that ten or twelve years ago it was not knowledge. It is certain that this curious result has grown into knowledge by somebody's discovery and invention. And who is that somebody? The question was put to my learned opponent, by my learned associate. If Charles Goodyear did not make this discovery,

who did make it? Who did make it? Why, if our learned opponent had said that he should endeavor to prove that some one other than Mr. Goodyear had made this discovery, that would have been very fair. I think the learned gentleman was very wise in not doing so. For I have thought often, in the course of my practice in law, that it was not very advisable to raise a spirit that one could not conveniently lay again. Now who made this discovery? And would it not be proper? I am sure it would. And would it not be manly? I am sure it would. Would not my learned friend and his coadjutor have acted a more noble part, if they had stood up and said that this invention was not Goodyear's, but it was an invention of such and such a man, in this or that country? On the contrary, they do not meet Goodyear's claim by setting up a distinct claim of anybody else. They attempt to prove that he was not the inventor, by little shreds and patches of testimony. Here a little bit of sulphur, and there a little parcel of lead; here a little degree of heat, a little hotter than would warm a man's hands, and in which a man could live for ten minutes or a quarter of an hour; and yet they never seem to come to the point. I think it is, because their materials did not allow them to come to the manly assertion that somebody else did make this invention, giving to that somebody a local habitation and a name. We want to know the name, and the habitation, and the location of the man upon the face of this globe, who invented vulcanized rubber, if it be not he who now sits before us.

Well, there are birds which fly in the air, seldom lighting, but often hovering. Now I think this is a question not to be hovered over, not to be brooded over, and not to be dealt with as an infinitesimal quantity of small things. It is a case calling for a manly admission and a manly defence. I ask again if there is anybody else than Goodyear who made this invention, who is he? Is the discovery so plain that it might have come about by accident? It is likely to work important changes in the arts everywhere. It introduces quite a new material into the manufacture of the arts, that material being nothing less than elastic metal. It is hard like metal, and

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as elastic as pure original gum elastic. Why, that is as great and momentous a phenomenon occurring to men in the progress of their knowledge, as it would be for a man to show that iron and gold could remain iron and gold, and yet become elastic like India Rubber. It would be just such another result. Now, this fact cannot be denied; it cannot be secreted; it cannot be kept out of sight; somebody has made this invention. That is certain. Who is he? Mr. Hancock has been referred to. But he expressly acknowledges Goodyear to be the first inventor. I say that there is not in the world a human being that can stand up, and say that it is his invention, except the man who is sitting at that table. The learned counsel may prove that A made a part, and B made a part, and C made a part, but A, B, C, and D, and all the rest of the alphabet disclaim this as their invention. There was a time, I admit, when there was a disagreement between Goodyear and Hayward, and Mr. Hayward was foolish enough to set up some pretences of his own, but was soon ashamed of it, and his chief merit is that he had the manliness to disclaim it.

I say, therefore, at this hour in which I have the honor to be speaking to this court, that there is not a man on the foot-stool who pretends this is his invention but one — not a man. Well, is that not enough? The invention exists — everybody knows and understands it, and everybody connected in former times with the manufacture of India Rubber has been astonished and surprised at it. There have been many respectable witnesses in this case, and the best and most intelligent of them say, after having been engaged in attempts in this manufacture for years and years, losing their time and fortunes, they never heard of or imagined any such thing, as the vulcanization of rubber, until Charles Goodyear's invention was made.

Now I go further in the matter than this general statement, taking the great mass of evidence before your Honors, and examining it, to prove that Mr. Goodyear is the inventor.

In the first place, the patent which he obtained is proof of that fact. I do not say conclusive, but I do say, it is in the strongest degree *prima facie* evidence of originality. The law of the United States, in this respect, stands on a different ground from what it did formerly, and from that in which the

British law now stands. An act of Congress on this subject has been passed, establishing a certain *quasi* judiciary power in the commissioner, and it is not now a matter of course, that upon the payment of thirty dollars you can obtain a patent. The invention must be submitted to the new tribunal, subjected to all the knowledge which it possesses, added to the knowledge of those who usually assist in making the inquiry as to the originality of the invention; and then the patent can only be issued after the preliminary tribunal has passed upon it, and has come to the conclusion that there is nothing in the Patent Office like it; nor in the books of any other country like it; and that it is new and useful. Then, and then only, can the patent be issued, and then it must be accompanied by the patentee's oath, that he is the inventor, a requirement which probably is not yet exacted in England. We have a court to sit upon every application, and to decide whether that application is for a new and useful invention. That tribunal passed upon this invention of Goodyear's, and found it new and useful. A patent was consequently awarded, and the discoverer, Mr. Goodyear, derived from it some reward for his great labors and sufferings, during the period of his trials and experiments.

Now may it please your Honors, I know but one man in the world who denies the originality of this invention. No one out of this court house denies it. I know but one within the court who denies it, and I shall say with great submission, that there is not a man in the world who should feel more bound not to deny the originality of this invention. It is Horace H. Day, the defendant in this case. He deny it! He deny it! Yet there is his bond. *Ecce signum!* Terms of contumely and complaint, however loudly uttered, and I am bound to add, however solemnly sworn to, upon the face of his answer, do not tear the seal from *his* bond, any more than the merchant of Venice tears the seal from the bond which he had given to the Venetian Jew. There it stands. Day's name is there, the seal is there, and there it will remain until he and all of us are called into another state of existence. I say, therefore, that he is the last man in the world, who should stand up and say, "I have a right to this invention, and to deny that it is

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Goodyear's invention. It is true I have acknowledged it under my hand and seal. It is true that I have derived very great advantages under it. It is true, I took a license under it to make shirred goods, and I promised to pay out of every yard, three cents to this inventor. It is true, I agreed to pay him three cents a yard, and I now make three dollars a yard from this great invention. I put into my treasures, thousands and thousands of dollars, by the use of the license under this patent, and I have not paid him the first cent which I promised. I repudiate the contract." Repudiation is a term which has been in bad odor for some time past—it is not likely to be in better.

There is a mass of testimony on this point, and here are witnesses, I suppose entirely respectable, and depositions which have not been kept secret. There are the witnesses, Haskins and Coolidge. I will, with your Honor's permission, refer to the names of some of the others.

Goodyear has been experimenting since 1834. Of that, there can be no question. It is proved by Henry B. Goodyear, John Haskins, and Nelson Goodyear, and a great many others; your Honors have references to their testimony. These, allow me to say, are persons who watched his progress—many of them engaged in similar employments, who noticed his experiments and their results. Notwithstanding all the difficulties he encountered, he went on. If there was reproach, he bore it. If poverty, he suffered under it; but he went on, and these people followed him from step to step, from 1834 to 1839, or until a later period, when his invention was completed, and then they opened their eyes with astonishment. They then saw that what they had been treating with ridicule, was sublime; that what they had made the subject of reproach, was the exercise of great inventive genius; that what they had laughed at, the perseverance of a man of talent with great perceptive faculties, with indomitable perseverance and intellect, had brought out as much to their astonishment, as if another sun had risen in the hemisphere above.

Mr. Webster then reviewed, as conclusive, the testimony of Professor Silliman, and referred to the absence of other claimants to this discovery.

Mr. Goodyear at this day stands in undisputed possession, and quiet enjoyment of everything secured to him by this patent, without molestation from any man on earth — except the defendant, Horace H. Day. He has used all his endeavors to disprove the validity of the discovery. Not another human being disputes it. Is not that conclusive? Does it not show the strong current of public judgment? Does it not show the strong judgment of popular justice, that Mr. Goodyear is regarded, and has the right to be regarded, as the true inventor of this invaluable result?

Mr. Webster then proceeded at some length to review the claim of Richard Collins to a like discovery, though not used by him, and the testimony of Collins; and was finally told by Judge Grier that he need not trouble himself with that testimony.

The court having adjourned, met at 10 o'clock A. M. Wednesday, March 31, 1852, when Mr. Webster resumed his argument.

I propose now, may it please your Honors, to say a few words upon the objections which have been taken in the answer and in the argument to the re-issued patent of 1849. The Law of 1836 contains this provision in the 13th Section, quite familiar of course to the Court, that “wherever a patent shall be inoperative,” etc.

Mr. Webster here read the section referred to.

I will proceed to state, very shortly, what I understand to be the construction which has been placed, authoritatively, upon this provision of the patent Law. I understand it to be settled law in the Supreme Court and all the circuits, that the Commissioner of Patents is the sole judge of the question whether the original patent was inoperative or invalid. In the second place, I suppose it to be adjudicated by the highest tribunal of the United States, that whether the error which made the original patent inoperative and invalid, arose from inadvertence or mistake and without fraudulent intention to mislead, is also to be decided by the Commissioner. These two points have been settled again and again, and it is not necessary that I should detain the Court by arguing them before it on this occasion. Then there comes another proposition; to wit, that

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the Commissioner is in like manner the sole judge of the question, whether the re-issued patent is for the same invention as the original patent, unless upon the face of the two patents the contrary appear and warrant the conclusion that the Commissioner has exceeded his duty or authority. I believe that the proposition has received the sanction of the Supreme Court of the United States; but it is understood, that since the decision the Chief Justice of the Supreme Court, has, in one case, permitted this question of identity to be submitted to a jury, upon the defendants express denial of it, and the express allegation of fraud. There was a case in which both parties assented to send the question of fraud to a jury, and that was a case tried in Baltimore on Woodworth's Planing Machine.

Judge GRIER — I have since tried two cases with the same issue, the only point being whether the re-issued patent was for the same invention as the original patent.

Mr. WEBSTER — That is to say the Chief Justice appears to entertain the opinion, that this question might be inquired into, and your Honor seems to be of that opinion, as you have tried the question by jury. If that be law, that the Court may look into this question of the original invention in comparison with the renewed patent; then the question is not whether the case must go to the jury on this point; but the question is, whether there is evidence before the Court to support the identity, or rather whether the defendant has disproved the identity in opposition to the presumption arising from the patent itself; for no doubt whether in this case, the decision of the Commissioner be final, or rather if it be not final, it is of the very highest degree of *primâ facie* and presumptive evidence, and the burden lies on the other side to disprove it. And here we must guard against what is a mistake, into which we might possibly run. The real question is, whether the re-issued patent is for the thing originally invented? Now, when the defendant undertakes to sustain that burden, he undertakes to prove that this re-issued patent is not in conformity to the original invention, and he does that, in the first place, by showing as he thinks, that the patent of 1844 does not describe the same thing as that of 1849. That is a proposition with a *non sequitur*.

There is no inference to be drawn from that. The patent of 1844 does not describe the same thing as that of 1849. Why? It is because the patent of 1844 did not properly describe the invention, and the Law authorizes this re-issuing of a patent precisely that it may furnish another and a better description of the invention. If one can hold up these two papers, and say 1844 says this, and 1849 says that, what of that? It is because 1844 does not express what 1849 does express and that 1849 has been obliged to talk, and to speak, and to show the real character and extent of the invention; that is the very object of the provision. It was to state with more accuracy and correctness of description, what 1844 had not stated with accuracy and correctness of description. So that your Honors see, it all comes back to this. Is that of 1849 a true description of the invention? If it be, there is an end to the inquiry.

I have spoken of the description; I speak now of the specification or claim. It is alleged that the patent of 1844 does not specify or claim such an invention as 1849 claims. This only proves, and all it does prove is, that the patentee had a right to surrender and take out a patent with a new specification and a new claim in 1849, provided that specification or that claim, thus contained in the re-issued patent of 1849 corresponds with the original invention. I think we might rest here — as on a clear *primâ facie* case, met by no opposing evidence whatever. Now is it proved by anybody? Or has any serious attempt been made to show by evidence that the re-issued patent of 1849 does not truly describe the invention? I know what my learned friend has said about steam heat, and I will offer a few observations by way of reply to this suggestion of his presently. But I say so far as I can find upon the record, that there is no evidence to rebut the strong presumptive and *primâ facie* proof deducible from the issue of the patent itself, under the judicial authority of the Commissioner to show that the patent of 1849 does not conform to the invention. But we may well go further, and we may prove and can prove; and I think, with submission to the Court, we have proved, by the correspondence between the plaintiff and Dr. Jones his agent, that he directed his agent to insert in his original patent the claim for sulphur and heat, just as that specification or claim

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stands in the amended, or re-issued patent, and that the failure to insert that specification, and that claim in the original patent, was therefore, most obviously, the consequence of inadvertence or mistake.

Now that is an important point, provided that there were any evidence to counteract the presumptive or *primâ facie* evidence of the patent itself. This is a point to be considered. The counsel whom I now follow, saw the force of this; a gentleman of his professional capacity could not fail to see what must be the result of proof now given, tending to show that the invention, as described by the inventor at the time, was in exact conformity to the claim and specification, in the re-issued patent, and that its omission in the patent of 1844, was occasioned by inadvertence or mistake; because he saw that that would bring the claim for the re-issued patent, precisely within the words of the law.

Now, there is on this record a correspondence, back as early as sometime in 1839, between the plaintiff in this case, and his agent Dr. Jones, of Washington, and there is a letter from the plaintiff to Dr. Jones, the force of which is exceedingly great, if it be a lawful paper in the cause.

Mr. Webster then reviewed this correspondence.

I will ask one of my associates to read the claim in the patent of 1849.

Mr. Dickerson read the claim, and Mr. Webster proceeded.

I have heard it said, that this correspondence in 1839, was written after the time in which it is proved the invention was made.

The elementary principle of the invention was discovered in 1839, and this letter of 1839, just as closely as the letter of 1844 refers to the invention, and it seems to state to his agent at Washington, what he wishes to be secured at the time he takes out his patent. This is a letter from Charles Goodyear to Dr. Jones in October, 1839. In this letter he is describing his invention, and to which Dr. Jones replied, and it is in proof in the cause.

Now here comes the claiming clause of the patent of 1849 ; reads on "Artificial heat, a high degree of artificial heat." Well, then, are these letters written in 1839 and 1843, genuine letters, and actually written as they purport to have been, at the time between the parties, or are they forgeries and spurious, and falsely foisted into this court, in order to qualify Good-year's original invention, so as to obtain a re-issue of the patent in 1849, conformably not to that, which was his original invention, but to something which he wished to make that original invention appear to be, by the insertion of false papers ?

Now commentaries are made, by my learned opponents upon the handwriting, in which these letters appear, and the signature purporting to be the signature of Mr. Goodyear attached thereto. They say the letters are not proved ; the handwriting is not proved ; that there are suspicions about it ; and until they are proved as muniments of his title and matters considered when his invention was first patented, they do not of course produce the effect, expected from them, or any effect whatever.

If they are false papers, they are good for nothing of course. Now how are they proved ? Why, in the common way. Mr. Brown, a professional gentleman of standing, who is acquainted with the handwriting, of both Charles Goodyear and Thos. P. Jones ; has corresponded with both of them, and knows their handwritings. He says that although this letter of Mr. Goodyear does not appear to be in his common or ordinary handwriting, yet he believes it is in his own handwriting. Is it not constantly said in a court of law, "this specimen was written in haste, or with a bad pen, there are some discrepancies, but I have no doubt it is his handwriting." Is there anything to counteract this evidence ? I don't know that any man would have the hardihood to swear, that a particular letter was absolutely in the handwriting of any man. I would not swear to many of my own letters, because I know there is an adroitness and expertness in forgeries, which sometimes prevents a gentleman from swearing, whether a particular letter is his or not. But this is a *prima facie* case, because nobody denies that this is Goodyear's handwriting. Why do I dwell on this ?

The proposition on the part of our learned opponents, is, that sometime afterwards, perhaps at about the time when he

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was applying for the re-issued patent, in order to make his original invention, appear to be broader than it was in truth, Goodyear set about to perpetrate a forgery and a crime, and he found a way somehow or other, to get on the records, a false and forged letter. Well, to do that, he has a letter prepared which he means shall be considered as in his own handwriting, and yet he gets somebody else to forge it! That is a very ingenious way for a man to cut his own throat.

He means that this letter, when produced, shall appear to have been written by himself at the time when it purports to have been written, and yet he gets somebody else, who writes a different hand, to write it for him!

Here is the original letter! and here is another thing! Here is an endorsement of Dr. Jones on the letter, and his handwriting is sworn to by the same witness. It is dated October 5th, 1839. It has been read.

I leave that. But is this necessary? Is it necessary to prove as against Mr. Day the legality of the issue of this amended patent?

How do we stand in that? How does it stand upon his own conduct? How does it stand upon his own acts? In the first place he covenanted that Mr. Goodyear might obtain a re-issued patent in such manner and form as he saw fit. But one word upon these covenants as we go along. Very soon I shall have the honor to submit to the Court my remarks upon the whole of these covenants, as an estoppel against Mr. Day, as to defences which he attempts to set up in this case.

Your Honors remember that when this case was opened by my friend, Mr. Choate, that learned and eloquent gentleman said he came here to discuss, and only to discuss the question of estoppel — that he did not wish to go into the evidence; he came to ask for a trial at Law upon that point alone.

Now, may it please your Honors, it does appear to me, that both that learned friend of mine and his associate, have kept their fingers off this question of estoppel, as if it had been a bed of burning coals; they have not touched it or said one word about it; they have not met it or discussed it; they have used no argument, deduced no proof, and said nothing upon the great questions which the learned gentleman, who opened the

cause for the defendant, said was the only question he came here to discuss. More of that in a more appropriate time and place, I mean in the plan of my remarks.

But in these covenants of October and November, 1846, the defendant does stipulate that Goodyear may whenever he sees proper surrender this Sulphur Patent of 1839 and the vulcanizing patent of 1844 and take them out anew. What does he now say to them, for it would seem certainly to conclude the defence against urging anything in opposition to the validity of this re-issued patent.

He meets it by saying, that he never heard that Goodyear claimed as his invention, the application of heat to the curing of rubber, but only to cure his particular compound; that it was not in his imagination when he signed these covenants, or when he agreed that a new patent might be issued, that Goodyear claimed anything but the application of heat to the curing of his compound, called the "Triple Compound."

Now, if by that he means to say that he never understood that Goodyear claimed to cure rubber by sulphur and heat, his own covenant directly conflicts with the assertion. The covenant called the 3d article, page 46, is in these words:

"THIRDLY. — The said Horace H. Day hereby covenants and agrees to and with the said Charles Goodyear, That while the said Goodyear protects the said Day in the exclusive right to manufacture and vend shirred or corrugated goods, *he, the said Day, will not manufacture any other articles of metallic rubber, or such as is compounded of rubber and sulphur, white lead or its oxides, or any such as it is necessary to complete and finish by the aid of artificial heat or sulphur, except for the purposes of experiment merely, and except in the manufacture of the articles which said Day, by said prior Articles, is authorized to manufacture.*"

He is speaking now *before* the patent of 1849, but after that of 1844, having covenanted with Goodyear that he might obtain such re-issue of patents as he thought fit. In article called thirdly, he covenants "that he, the said Day will not manufacture any other articles of metallic rubber, or any such as it is necessary to complete and finish by the aid of artificial heat or sulphur." Why does he now undertake to say that it never entered into his head that the thing was claimed by

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Goodyear, which very thing he, in this covenant of 1846, stipulates he will not use? Why, what does he mean by that? Does he mean that he entered into that covenant and bound himself to Goodyear, to use, not anything which he supposed Goodyear had any power to prevent him from using, but a covenant not to use a thing which was open to himself and all the world to use. For that is the position in which Day places himself by this covenant in his answer, compared with his covenant. He covenants, according to what he now states in his answer, for a thing which he supposed did not belong to Goodyear; for a thing, in regard to the use of which by him, Goodyear had no right to complain, which is common to everybody else; and yet he places himself in the awkward position of coming into a solemn covenant with Goodyear, that he will not use a thing which all the world may use? Is there any escape from that? Certainly not!

Now it is vain and idle to say that the covenants in these obligations were on condition of Day's being protected in his license. That is not the point. The point is that this covenant contradicts his answer. It contradicts his answer directly, by showing that he expressly discriminates between vulcanizing rubber by the use of three ingredients and vulcanizing it by the combination of sulphur and rubber alone. He expressly stipulates that he will not use rubber vulcanized by a combination of sulphur and rubber alone. Well, now, how can he say in the face and eyes and teeth of his own obligation, that all he thought Mr. Goodyear claimed was the vulcanizing by his "*triple compound*." Why did he stipulate then, that he would not violate the "double compound," the compound of sulphur and rubber alone? Why did he enter into that stipulation if that was open to him, and if he supposed nothing was assured to Goodyear, but the combination of the three ingredients, the "triple compound"?

He did understand therefore; he must have understood; it is idle to deny it, that Goodyear claimed the curing of India Rubber by means of a compound of sulphur and rubber alone.

I am not the adviser of Mr. Day in matters of law or discretion, or in matters of business, but I think I can see that, in this respect, it would have been somewhat more prudent

for him to have upholden Goodyear's patent for the double compound alone, as he had a right to use it, and to stand therefore on a privilege and on a license excluding others. It seems to me, that would have been a more discreet exercise of his desire to promote his own interest than to deny the right of Goodyear to protect such a compound, and let all the rest of mankind into the use of it, barring himself out.

Our learned friend thought the claim in the re-issued patent was too broad; that it extended beyond the original invention, and therefore on that ground the patent could not be sustained. He said that the use of steam was necessary to vulcanize rubber when mixed only with sulphur. He said that it did not appear, at the time of his application for the original patent, Goodyear understood the use of steam, or embraced it as one of his forms of artificial heat. Allow me to say in the first place, that your Honors will find upon that record, that he did understand the use of steam, and that he practised it in various ways. It is detailed on the record. He tried vulcanizing rubber and sulphur in steam boilers.

But it is contended that sulphur and rubber will not vulcanize in dry heat: the contrary is proved by his experiments. We have offered to prove it in the presence of the Court; and we again offer to prove it by experiment before the Court.

Our learned friend thought that such experiments might be so conducted as to produce wrong results, and declined our proposition. We do not complain of this, but we offered to subject our proceedings to his particular acumen, and in such matters he is generally, I have no doubt as wide awake, as when called to the subtlest points of law.

But suppose rubber and sulphur alone cannot be vulcanized in dry atmospheric heat? what then? That is not the question. It is whether they can be vulcanized by artificial heat. That is what we claim.

We claim the vulcanization of rubber and sulphur by artificial heat, however produced.

Why the means of producing heat are common to all mankind. In all ages of the world; in all conditions of society, especially in cold climates, there must be heat, and artificial heat, and the means of producing it, I had almost said, are

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infinitely various. The result is the same—heat is heat, however produced, or by whatsoever agents. And whether produced by steam, therefore, or by coal and faggots, it is the same thing.

Why did not our learned friend argue that he could not use electricity? Is there a thing in the world that produces heat like electricity? Friction produces artificial heat. I remember in the poetry of Mr. Canning published in the *Anglo-Saxon* not many years ago, describing the progress of man from the savage to a civilized state, he says:

“To cook his victuals is man’s first desire,
So two dry sticks he rubs and lights a fire.”

Friction is one mode of producing heat, and steam is another, and electricity is another, and all the whole range of means produce the same result. The method of communicating the heat is not patented. He does not confine the application of heat to that produced by one particular cause of operations. I agree that if one should now invent some new method of generating heat, not known at the time of Mr. Goodyear’s invention, and which had never been known, and should now take out a patent for that new method of producing heat, the consequence would be that Goodyear could not use that improved mode of producing heat to cure rubber, any more than he could use it to propel a steamboat.

What I mean is, that it would be absurd to say, that an inventor of any form or use of new heat, or the new method of producing heat, could on that account vulcanize rubber, or take a patented steam engine, and use that patented steam engine, or a patent stove, because to the one or the other he applied the heat produced by some newly discovered agency. Those who owned the patented steamboat and stove, would not be entitled to use his newly invented form or production of heat. That is his own. But he could not, by applying a new form of heat to a patented process of vulcanizing rubber go on and destroy all those existing patent rights, by producing a heat to carry them into operation, and keep them at work, which form of heat was unknown when the patent was granted. I suppose that is plain enough. Steam is not

patented to cure rubber; on the contrary, it is curing India Rubber by artificial heat, that is patented. These are matters of fact which are to be considered, and are in the evidence, but the great principle which the patent claims, is the vulcanizing of rubber, by a high degree of artificial heat.

And now, may it please your Honors, I shall state in very few terms, the object of this Bill as we understand that object to be. This Bill is filed for the purpose of enjoining the defendant from the violation of the patents therein set up, and the reference made in the Bill to the agreement between the parties, is for the purpose of raising against the defendant, an estoppel, in point of law, or at least evidence of the highest order and degree, in favor of the validity of these patents. That is his own acknowledgment, his own acknowledgment under his hand and seal. The Bill asks no account of the work done under the license, it nowhere alleges that the tariff in regard to the license remains unpaid. We seek to enjoin him by the strong arm of the law, and the judgment of this Court, from using these patents, or any of them, for the production of any articles of trade and manufacture, except those which by his agreement with Goodyear, he was at liberty to use. This is stated in as absolute a form as we could put it, to be the object of this Bill, and it will be submitted to the court.

Then comes an important question, may it please your Honors, as to parties. We have considered this matter, and I here have to acknowledge my great obligations to an experienced member of the profession, as well as a personal friend of mine, of very long standing, for his references and advice upon this subject. Of course I mean Mr. Staples.

What we have to say upon this subject, is reduced in the shortest way to paper, and if your Honors will allow me the indulgence of having it read by one of my associates, I should esteem it a favor.

Mr. Dickinson read the paper.

I look to the time when the ships that traverse the ocean, will have India Rubber sails, when the sheathing of ships will have this metallic vegetable production, and be composed of it. I see, or think I see, thousands of other uses to which

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this extraordinary product is to be applied, and if I understand the matter, Mr. Goodyear's interest during the duration of his patent, extends and covers all those uses, so that to my apprehension, that which he has already parted with, is dust, and the dust of the balance, in proportion to the other uses now beginning to be developed, to which this product may be applied.

But now, may it please your Honors, I come to that which, if I shall go through with it understandingly, will bring my observations in this cause near a close; and it is that part of the case which I approach with the greatest reluctance, and with some degree of pain. I would avoid it if I could consistently with my professional duties; and, in discharging it, I mean to deal with no epithets. I mean to use the softest words to express the ideas which I find it my duty to present to the consideration of the court. I now, sirs, take up the defendant's *answer*, — the defendant's *answer* to this Bill.

May it please your Honors, this *answer* is a sworn *answer*. Horace H. Day has made solemn oath, that this answer, so far as respects his own acts, is true, and so far as it respects the acts of others, he believes it to be true. That is nothing less than a very solemn proceeding. He could not have been advised by his learned counsel that an answer was like a plea in an action at law; that he had as much right to state a fact here in opposition to an assertion in the Bill, as he would have to put in a plea of *non assumpsit* in account of law, to a declaration on a note.

Now I suppose that there is no proceeding in which a man is more bound by law and morals to be perfectly accurate, and perfectly true in his oath, than when he appends his oath to an *answer* in Chancery. And the reason is, that the law allows him the great privilege of defeating the whole suit if he can, solely by his own answer under oath. And your Honors know that hundreds and hundreds of complaints and Bills in Equity are defeated every year upon the strength of the defendant's swearing in his own case, because the law allows him to swear in his own case, and the law makes his answer conclusive in his own favor, unless it can be contra-

dicted by two witnesses, or by one witness, and other circumstances equivalent to a second witness.

This is a solemn matter, then, very, very solemn. It is no trifling concern. It is nothing to be done inconsiderately or hastily, and therefore I say, that no professional gentleman, of the eminence of those whom we see to have been employed here, could have advised the signature of the defendant to this answer, and his solemnly swearing to its truth, without suggesting to him the greatest caution in every averment, in every affirmation, or every denial.

I shall be obliged, in the course of my remarks on these averments and denials, to take very slight notice of those of them which, though they may not be true, are not material to the merits of the question. I shall be obliged perhaps, at the expense of some draft upon your Honors' attention, to look very carefully into other sworn facts, affirmations and denials, in this answer, and to see what evidence they have encountered in this cause. I think there are some forty propositions either affirmative or negative, in this answer; I shall go over some of them very shortly.

This Mr. Webster then proceeded to do.

Through the whole months of December, 1842, and January, 1843, he [Day] was exploring sources from which he could learn a secret. A secret which he swears he possessed in all its particulars eleven months before. Well, what does he mean? What is it he says in that letter, which he, Day, wrote and asked Cutler to return to him — and it was returned to him, as Cutler swears. Now we have called upon Mr. Day to produce that letter, and he does not produce it. We wish to see it and he will not let us see it. We wish it to be taken from his folio, and placed on the files of this court. He will not permit it. Long ago, may it please your Honors, sitting as a student, outside the bar, I heard that eminent man, Theophilus Parsons, in a case of this kind, with a terseness and strength, which your Honors know belonged to everything he said and wrote, say to the Jury, Gentlemen, I tell you as a matter of sense, and justice, and law, that everything shall be taken most strongly against him who *can* show, and *won't* show. That is true.

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Now I have concluded the evidence which I propose to submit to the court to contradict the statement in the answer, which I read at the commencement of my observations. I submit it to the most candid and most charitable, and most indulgent judgment of this Court. And I invoke the pronouncement of that most candid, most charitable, and most indulgent consideration of this Court, upon the question whether that averment in this answer—direct, positive, material in the highest degree, is not entirely overthrown by numerous witnesses, and some of them Day's own. Overthrown too by his own correspondence not to be denied, and by his own course of conduct for months and months wholly unexplained, and wholly incapable of any explanation.

Mr. Webster then analyzed this evidence and correspondence.

There is an important head upon which I have yet something to say, and that is the argument which has been addressed to the court, that there should be a trial at law in this case, and that this court cannot, according to the rules and principles of equity, issue a perpetual injunction, to restrain this defendant from a further violation of these patents, until the plaintiff has established his title at law. Well, this struck me, I confess, when it was announced, as being a very extraordinary proposition. There *has* been a trial at law. This matter has been submitted to a jury. This defendant *has* had a full right and opportunity to discuss everything he chose to discuss, respecting the validity of this patent before a jury of his country. He was sued in the person of his agents at Boston. The case was pressed on for trial. You perceive the anxiety Day manifested, in the papers we have read, to bring this settlement to a close; the eagerness to do so founded upon the fact that the Boston trial was coming on. Day says in one of his notes, this business must be settled tomorrow, or else it will not be in season to stop the trial at Boston. Well, what happened? What happened? Instead of going to trial, and contending for a verdict to the end, he let the verdict and judgment of the court go against him by his express consent, having entered into an engagement to work under the license. And now he wants to try it! Has he not

had a chance to avail himself of that security to public and private right allowed to everybody? Is not that enough? Is he to have another trial? Suppose we institute another suit against him and press that suit, and get another verdict and judgment against him? What of that? That does not restrain him, and your Honors see by his own declarations, how he intends to avoid the decisions of juries and courts. Suppose we sue him and he puts the cause off two years, and then consents to another verdict. This does not stop him according to his view. I say it is unheard of, that a party charged with the infringement of a patent right, having had one fair chance to try that question before a jury, having voluntarily struck his colors in the presence of the jury, and suffered a verdict and judgment to go against him by consent, is ever entitled, on the face of the earth, to have another trial. There would be no end to litigation if a contrary rule prevailed. There is no justice in the defendant's suggestion on this point. What appears on the records of Massachusetts? A judgment for Goodyear against Seaver & Knowlton, Day's agents, for \$500 — and the costs entered by Day's consent.

That is a part of the agreement. But there stands the judgment, and it shows he had an opportunity of testing this very matter. What more can be done, or what more can be necessary? It is vain to say this was collusion. Suppose it was (to go out of the way, and make an admission so unwarrantable) the right has been established by law. Can a party who is *particeps criminis* in a collusive judgment defeat it himself? Pray tell me in what book of law any proposition so preposterous can be seen.

Mr. Cutting — "He can if you claim under the judgment."

Mr. Webster — We claim under our Patent, and don't, I beseech you, charge us with claiming anything as a favor under Horace H. Day. We claim under our Patent and under the law, and when he sets up the covenant which comes out first in his answer, he admits he was a party to it, and then expects to be released from its binding obligations, on account of collusion to which he was a party. Never in any primer of the law up to the most elaborate treatise, was a proposition

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advanced so abhorrent to the law or to justice, or more deserving the contempt of mankind.

Now, on the general question. It is conceded by the other side that the Court of Chancery in England or here, has what Mr. Choate calls the gigantic power to grant an injunction without a jury or any aid from a Court of Law. He contends, however, that the practice has become settled in England, so as to be almost a doctrine that, until after the verdict of a jury, a perpetual Injunction will not be granted. Now, we say there is no such doctrine, settled as an invariable rule or even practice, in England or here. (*Reads.*)

Perhaps, as has been suggested, it was intended to relieve the Equity tribunal from the labor of examining the questions of fact with witnesses. The Chancery Court is not attended by a jury in England, and if a case involving much complexity of evidence were to be tried by the Chancellor it would impose upon him a great labor, which he gets rid of by sending it to be tried at law. There is a mistake in the gentleman's statement, and it is hardly worth while going back to it. I would as lief have it taken now as at any other time. If the section is applicable, then it shows a strong reason for sending these cases to the jury in England. It is not so. I will state that statute. This prescription is in the 2d section of the Statute of James I. But then the exception in favor of patents for useful manufactures is in a subsequent section, and that subsequent section says, "That the provisions of the act shall not extend to Letters Patent for new manufactures," etc., provided they have been according to law and not mischievous to the State by raising prices of commodities at home or hurt of trade, or generally inconvenient. (*Reads.*)

That is what is said. It does not bear, however much upon the case, and therefore my learned friends may have it their own way.

It is perfectly well settled that when a Court of Equity, directs issues, or a trial at law, it yet has the power to disregard the finding of the jury, and proceed to decree according to its own views of the case. Now, I think that covers the whole ground. If you are not obliged to regard the finding of a jury when it comes before you, then of course, it must be in

your Honors' discretion whether to award an issue or not, and I am quite willing to put it upon the question of discretion — quite willing.

This judicature is composed of two judges. There is a mass of testimony respecting a patent right, and an alleged violation of that patent right. The Court have listened with great patience to the reading of that evidence and to the comments upon it for a week. That comment is now approaching its termination. Now, I shall leave it with your Honors, being thus acquainted with the evidence, seeing the entire case, to say whether you feel that your conscience needs to be enlightened as to the merits of this controversy by a trial at the Bar of this Court or elsewhere. Is there in this judicature a member who feels a reasonable, conscientious doubt on any vital question of fact in this cause? It is proper to state it in that way because I say it is a question of discretion. It is not a question of right to be demanded on the one side or on the other. It is a question of discretion, arising from the collection of a vast body of evidence, after the promulgation of that evidence, after a final hearing of that evidence, and when the cause is ripe for decision and a perpetual injunction, unless the Court feels conscientiously that there is something affecting the right of the parties still untold, which they cannot with conscientious conviction settle themselves, and in regard to which they have conscientious reasons to believe a jury would enlighten them.

The cases, I should add, where there is the disposition to send questions of Equity to Law, to be tried in the progress of an Equity suit, are much less usual in our practice than in England. They are left more to the good sense of our tribunals. The necessity of expediting business, and the fact which everybody knows, that a Court of enlightened judges is not only as competent, but more competent to settle questions arising under the construction of a patent, so often mixed of law and facts, (for there is hardly a question that is not mixed of law and facts arising under a patent,) I say a combination of them leads courts not uselessly to send patents to law, to be tried by a jury. What is there a jury can say that is not proved in this case? The issue of the patent, the fact that

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the renewed patent is no broader or narrower than the invention; of all these facts, I do not know one that can be said to be doubtful.

But I hasten to conclude my remarks by reference to the estoppel. What right has Horace H. Day to dispute these patents, or raise any question respecting them? What right has he? I think he is estopped to deny the plaintiff's title, by every form of estoppel which the law recognizes, accumulated one upon another. I think he is estopped by matters *in pais*, in deed, and by matter of record.

Now, in the first place, as to his being estopped by his own conduct and acts, independent of obligations under seal. Day's offer of reward to anybody who would give information by which infringers of these patents could be brought to justice, are dated January 6th, 1847, and are on the record. (*Reads.*)

The original paper which he signed as one of the confederates is in Court; and in pursuance of that agreement he paid \$50.00, and took that long note. My friend near me suggests that this note was of the aloe kind: it matures once in a century.

He is estopped by deed, &c., (*Reads,*) and yet he comes in and denies his covenant. One cannot enlarge upon this. It is conclusive without comment. It is perfectly conclusive, or it is good for nothing. It is like round shot — it executes its purpose, or falls dead before it reaches the ship.

He is estopped by Record. There is the judgment in Boston, and the judgment for him here, just as conclusive; for the judgment here rendered for him on one issue, was rendered for Goodyear on another, and he pleaded *non est factum* to Goodyear's declaration on the covenant of 1846, and knew he had a right under that plea to give evidence of fraud. I had supposed that, according to the plainest rules of law, if the patent was fraudulent, Goodyear, who obtained it by means of fraud, knew it; and, therefore, the bond might be set aside upon that plea of *non est factum*. Your Honor observes, that we set this agreement to be an estoppel, and I suppose the law to be, that where, as in this case, the matter of estoppel is first presented by the answer, the court will give

it full effect as an estoppel, and the plaintiff may claim its entire force as such. And as to the estoppel by record, the court are bound, wherever it appears, to enforce it for great reasons of public policy.

The court will not suffer its time, and the time important to other parties, to be taken up with questions which have already been settled, and especially before the court itself. I look upon this trial and judgment in the covenant suits as an estoppel by record. It is to be used by the authority of the court who will not suffer parties to open anew that which has been settled according to law.

I have now gone through this case, and it may seem that I have done so too much at length. I find my apology in the importance of some of the topics it involves. I have to express my thanks in common with the other gentlemen on both sides of this cause for the kindness and indulgence awarded to me by your Honors. I feel how many obligations I am under in this respect. And as this is the first time that I have presented myself professionally in the State of New Jersey, and as I have cultivated a very long acquaintance with the good people of this State more intimately than with those of any other State, with the exception of that in which I have so long lived, and as I have great regard for them, I am not willing to leave this performance of my duty, and to leave this State, without congratulating the citizens of New Jersey with the certainty, that while this tribunal shall continue to be constituted as it now is constituted, the administration here of the Laws of the United States will be such as to secure all the people in the full enjoyment of their constitutional and political rights, and to give them that happiness so felicitously expressed in the wish of Lord Coke "of living always under the protection of the law and in the gladsome light of Jurisprudence."

Early Addresses and Papers

Oration at Hanover, N. H.

JULY 4, 1800.¹

COUNTRYMEN, BRETHREN, AND FATHERS, We are now assembled to celebrate an anniversary, ever to be held in dear remembrance by the sons of freedom. Nothing less than the birth of a nation, nothing less than the emancipation of three millions of people, from the degrading chains of foreign dominion, is the event we commemorate.

Twenty four years have this day elapsed, since United Columbia first raised the standard of Liberty, and echoed the shouts of Independence!

Those of you, who were then reaping the iron harvest of the martial field, whose bosoms then palpitated for the honor of America, will, at this time, experience a renewal of all that fervent patriotism, of all those indescribable emotions, which then agitated your breasts. As for us, who were either then unborn, or not far enough advanced beyond the threshold of existence, to engage in the grand conflict for Liberty, we now most cordially unite with you, to greet the return of this joyous anniversary, to hail the day that gave us Freedom, and hail the rising glories of our country!

¹ "An Oration pronounced at Hanover, New Hampshire, the 4th Day of July, 1800; being the Twenty-fourth Anniversary of American Independence. By Daniel Webster, Member of the Junior Class, Dartmouth University.

'Do thou, great LIBERTY, inspire our souls,
'And make our lives in thy possession happy,
'Or our deaths glorious in thy just defence!'

ADDISON.

"Published by request of the subscribers. Printed at Hanover, by Moses Davis, 1800."

On occasions like this, you have heretofore been addressed, from this stage, on the nature, the origin, the expediency of civil government. The field of political speculation has here been explored, by persons, possessing talents, to which the speaker of the day can have no pretensions. Declining therefore a dissertation on the principles of civil polity, you will indulge me in slightly sketching on those events, which have originated, nurtured, and raised to its present grandeur the empire of Columbia.

As no nation on the globe can rival us in the rapidity of our growth, since the conclusion of the revolutionary war — so none, perhaps, ever endured greater hardships, and distresses, than the people of this country, previous to that period.

We behold a feeble band of colonists, engaged in the arduous undertaking of a new settlement, in the wilds of North America. Their civil liberty being mutilated, and the enjoyment of their religious sentiments denied them, in the land that gave them birth, they fled their country, they braved the dangers of the then almost unnavigated ocean, and sought, on the other side the globe, an asylum from the iron grasp of tyranny, and the more intolerable scourge of ecclesiastical persecution. But gloomy, indeed, was their prospect, when arrived on this side the Atlantic. Scattered, in detachments, along a coast immensely extensive, at a remove of more than three thousand miles from their friends on the eastern continent, they were exposed to all those evils, and endured all those difficulties, to which human nature seems liable. Destitute of convenient habitations, the inclemencies of the seasons attacked them, the midnight beasts of prey prowled terribly around them, and the more portentous yell of savage fury incessantly assailed them. But the same undiminished confidence in Almighty God, which prompted the first settlers of this country to forsake the unfriendly climes of Europe, still supported them, under all their calamities, and inspired them with fortitude almost divine. Having a glorious issue to their labors now in prospect, they cheerfully endured the rigors of the climate, pursued the savage beast to his remotest haunt, and stood, undismayed, in the dismal hour of Indian battle.

Scarcely were the infant settlements freed from those

dangers, which at first environed them, ere the clashing interests of France and Britain involved them anew in war. The colonists were now destined to combat with well appointed, well disciplined troops from Europe; and the horrors of the tomahawk and the scalping knife were again renewed. But these frowns of fortune, distressing as they were, had been met without a sigh, and endured without a groan, had not imperious Britain presumptuously arrogated to herself the glory of victories, achieved by the bravery of American militia. Louisburgh must be taken, Canada attacked, and a frontier of more than one thousand miles defended by untutored yeomanry; while the honor of every conquest must be ascribed to an English army.

But while Great Britain was thus ignominiously stripping her colonies of their well earned laurel, and triumphantly weaving it into the stupendous wreath of her own martial glories, she was unwittingly teaching them to value themselves, and effectually to resist, in a future day, her unjust encroachments.

The pitiful tale of taxation now commences — the unhappy quarrel, which issued in the dismemberment of the British empire, has here its origin.

England, now triumphant over the united powers of France and Spain, is determined to reduce, to the condition of slaves, her American subjects.

We might now display the Legislatures of the several States, together with the general Congress, petitioning, praying, remonstrating; and, like dutiful subjects, humbly laying their grievances before the throne. On the other hand, we could exhibit a British Parliament, assiduously devising means to subjugate America — disdaining our petitions, trampling on our rights, and menacingly telling us, in language not to be misunderstood, "Ye shall be slaves!" We could mention the haughty, tyrannical, perfidious Gage, at the head of a standing army; we could show our brethren attacked and slaughtered at Lexington! our property plundered and destroyed at Concord! Recollection can still pain us, with the spiral flames of burning Charlestown, the agonizing groans of aged parents, the shrieks of widows, orphans and infants!

Indelibly impressed on our memories, still live the dismal scenes of Bunker's awful mount, the grand theatre of New England bravery; where slaughter stalked, grimly triumphant! where relentless Britain saw her soldiers, the unhappy instruments of despotism, fallen, in heaps, beneath the nervous arm of injured freemen! There the great Warren fought, and there, alas, he fell! Valuing life only as it enabled him to serve his country, he freely resigned himself, a willing martyr in the cause of Liberty, and now lies encircled in the arms of glory!

Peace to the patriot's shades — let no rude blast
Disturb the willow, that nods o'er his tomb.
Let orphan tears bedew his sacred urn,
And fame's loud trump proclaim the hero's name,
Far as the circuit of the spheres extends.

But, haughty Albion, thy reign shall soon be over, — thou shalt triumph no longer! thine empire already reels and totters! thy laurels even now begin to wither, and thy fame decays! Thou hast, at length, roused the indignation of an insulted people — thine oppressions they deem no longer tolerable.

The 4th day of July, 1776, is now arrived; and America, manfully springing from the torturing fangs of the British Lion, now rises majestic in the pride of her sovereignty, and bids her Eagle elevate his wings! The solemn declaration of Independence is now pronounced, amid crowds of admiring citizens, by the supreme council of our nation; and received with the unbounded plaudits of a grateful people.

That was the hour when heroism was proved, when the souls of men were tried. It was then, ye venerable patriots, it was then you stretched the indignant arm, and unitedly swore to be free! Despising such toys as subjugated empires, you then knew no middle fortune between liberty and death. Firmly relying on the patronage of heaven, unwarping in the resolution you had taken, you, then undaunted, met, engaged, defeated the gigantic power of Britain, and rose triumphant over the ruins of your enemies! Trenton, Princeton, Bennington and Saratoga were the successive theatres of your victories, and the utmost bounds of creation are the limits to

your fame! The sacred fire of freedom, then enkindled in your breasts, shall be perpetuated through the long descent of future ages, and burn, with undiminished fervor, in the bosoms of millions yet unborn.

Finally, to close the sanguinary conflict, to grant America the blessings of an honorable peace, and clothe her heroes with laurels, Cornwallis, at whose feet the kings and princes of Asia have since thrown their diadems, was compelled to submit to the sword of our father Washington. The great drama is now completed — our Independence is now acknowledged and the hopes of our enemies are blasted forever! Columbia is now seated in the forum of nations, and the empires of the world are lost in the bright effulgence of her glory!

Thus, friends and citizens, did the kind hand of over-ruling Providence conduct us, through toils, fatigues and dangers, to Independence and Peace. If piety be the rational exercise of the human soul, if religion be not a chimera, and if the vestiges of heavenly assistance are clearly traced in those events, which mark the annals of our nation, it becomes us, on this day, in consideration of the great things, which the Lord has done for us, to render the tribute of unfeigned thanks, to that God who superintends the Universe, and holds aloft the scale that weighs the destinies of nations.

The conclusion of the revolutionary war did not conclude the great achievements of our countrymen. Their military character was then, indeed, sufficiently established; but the time was coming, which should prove their political sagacity.

No sooner was peace restored with England, the first grand article of which was the acknowledgment of our Independence, than the old system of confederation, dictated, at first, by necessity, and adopted for the purposes of the moment, was found inadequate to the government of an extensive empire. Under a full conviction of this, we then saw the people of these States engaged in a transaction, which is, undoubtedly, the greatest approximation towards human perfection the political world ever yet experienced; and which, perhaps, will forever stand in the history of mankind, without a parallel. A great Republic, composed of different States, whose interest in all respects could not be perfectly compatible,

then came deliberately forward, discarded one system of government and adopted another, without the loss of one man's blood.

There is not a single government now existing in Europe, which is not based in usurpation, and established, if established at all, by the sacrifice of thousands. But in the adoption of our present system of jurisprudence, we see the powers necessary for government, voluntarily springing from the people, their only proper origin, and directed to the public good, their only proper object.

With peculiar propriety, we may now felicitate ourselves, on that happy form of mixed government under which we live. The advantages, resulting to the citizens of the Union, from the operation of the Federal Constitution, are utterly incalculable; and the day, when it was received by a majority of the States, shall stand on the catalogue of American anniversaries, second to none but the birthday of Independence.

In consequence of the adoption of our present system of government, and the virtuous manner in which it has been administered, by a Washington and an Adams, we are this day in the enjoyment of peace, while war devastates Europe. We can now sit down beneath the shadow of the olive, while her cities blaze, her streams run purple with blood, and her fields glitter, a forest of bayonets. The citizens of America can this day throng the temples of freedom, and renew their oaths of fealty to Independence; while Holland, our once sister republic, is erased from the catalogue of nations; while Venice is destroyed, Italy ravaged, and Switzerland, the once happy, the once united, the once flourishing Switzerland lies bleeding at every pore.

No ambitious foe dares now invade our country. No standing army now endangers our liberty. Our commerce, though subject in some degree to the depredations of the belligerent powers, is extended from pole to pole; and our navy, though just emerging from nonexistence, shall soon vouch for the safety of our merchantmen, and bear the thunder of freedom around the ball!

Fair Science too, holds her gentle empire amongst us, and almost innumerable altars are raised to her divinity, from

Brunswick to Florida. Yale, Providence and Harvard now grace our land; and Dartmouth, towering majestic above the groves, which encircle her, now inscribes her glory on the registers of fame! Oxford and Cambridge, those oriental stars of literature, shall now be lost, while the bright sun of American science displays his broad circumference in un-eclipsed radiance.

Pleasing, indeed, were it here to dilate on the future grandeur of America; but we forbear; and pause, for a moment, to drop the tear of affection over the graves of our departed warriors. Their names should be mentioned on every anniversary of Independence, that the youth, of each successive generation, may learn not to value life, when held in competition with their country's safety.

Wooster, Montgomery and Mercer, fell bravely in battle, and their ashes are now entombed on the fields that witnessed their valor. Let their exertions in our country's cause be remembered, while Liberty has an advocate, or gratitude has place in the human heart.

Greene, the immortal hero of the Carolinas, has since gone down to the grave, loaded with honors, and high in the estimation of his countrymen. The courageous Putnam has long slept with his fathers; and Sullivan and Cilley, New Hampshire's veteran sons, are no more numbered with the living.

With hearts penetrated by unutterable grief, we are at length constrained to ask, where is our Washington? where the hero, who led us to victory — where the man, who gave us freedom? Where is he, who headed our feeble army, when destruction threatened us, who came upon our enemies like the storms of winter; and scattered them like leaves before the Borean blast? Where, O my country! is thy political saviour? where, O humanity! thy favorite son?

The solemnity of this assembly, the lamentations of the American people will answer, "alas, he is now no more — the Mighty is fallen!"

Yes, Americans, your Washington is gone! he is now consigned to dust, and "sleeps in dull, cold marble." The man, who never felt a wound, but when it pierced his country, who never groaned, but when fair freedom bled, is now forever

silent! Wrapped in the shroud of death, the dark dominions of the grave long since received him, and he rests in undisturbed repose! Vain were the attempt to express our loss — vain the attempt to describe the feelings of our souls! Though months have rolled away, since he left this terrestrial orb, and sought the shining worlds on high, yet the sad event is still remembered with increased sorrow. The hoary headed patriot of '76 still tells the mournful story to the listening infant, till the loss of his country touches his heart, and patriotism fires his breast. The aged matron still laments the loss of the man, beneath whose banners her husband has fought, or her son has fallen. At the name of Washington, the sympathetic tear still glistens in the eye of every youthful hero, nor does the tender sigh yet cease to heave, in the fair bosom of Columbia's daughters.

Farewell, O Washington, a long farewell!
Thy country's tears embalm thy memory:
Thy virtues challenge immortality;
Impressed on grateful hearts, thy name shall live,
Till dissolution's deluge drown the world!

Although we must feel the keenest sorrow, at the demise of our Washington, yet we console ourselves with the reflection, that his virtuous compatriot, his worthy successor, the firm, the wise, the inflexible Adams still survives. Elevated, by the voice of his country, to the supreme executive magistracy, he constantly adheres to her essential interests; and, with steady hand, draws the disguising veil from the intrigues of foreign enemies, and the plots of domestic foes. Having the honor of America always in view, never fearing, when wisdom dictates, to stem the impetuous torrent of popular resentment, he stands amidst the fluctuations of party, and the explosions of faction, unmoved as Atlas,

“While storms and tempests thunder on its brow,
And oceans break their billows at its feet.”

Yet, all the vigilance of our Executive, and all the wisdom of our Congress have not been sufficient to prevent this country from being in some degree agitated by the convulsions of

Europe. But why shall every quarrel on the other side the Atlantic interest us in its issue? Why shall the rise, or depression of every party there, produce here a corresponding vibration? Was this continent designed as a mere satellite to the other? Has not nature here wrought all her operations on her broadest scale? Where are the Mississippis and the Amazons, the Alleghanies and the Andes of Europe, Asia or Africa? The natural superiority of America clearly indicates, that it was designed to be inhabited by a nobler race of men, possessing a superior form of government, superior patriotism, superior talents, and superior virtues. Let then the nations of the East vainly waste their strength in destroying each other. Let them aspire at conquest, and contend for dominion, till their continent is deluged in blood. But let none, however elated by victory, however proud of triumphs, ever presume to intrude on the neutral station assumed by our country.

Britain, twice humbled for her aggressions, has at length been taught to respect us. But France, once our ally, has dared to insult us! she has violated her obligations; she has depredated our commerce — she has abused our government, and riveted the chains of bondage on our unhappy fellow citizens. Not content with ravaging and depopulating the fairest countries of Europe, not yet satiated with the contortions of expiring republics, the convulsive agonies of subjugated nations, and the groans of her own slaughtered citizens, she has spouted her fury across the Atlantic; and the stars and stripes of Independence have almost been attacked in our harbors! When we have demanded reparation, she has told us, “give us your money, and we will give you peace.” Mighty Nation! Magnanimous Republic! Let her fill her coffers from those towns and cities, which she has plundered; and grant peace, if she can, to the shades of those millions, whose death she has caused.

But Columbia stoops not to tyrants; her sons will never cringe to France; neither a supercilious, five-headed Directory, nor the gasconading pilgrim of Egypt will ever dictate terms to sovereign America. The thunder of our cannon shall insure the performance of our treaties, and fulminate destruc-

tion on Frenchmen, till old ocean is crimsoned with blood, and gorged with pirates !

It becomes us, on whom the defence of our country will ere long devolve, this day, most seriously to reflect on the duties incumbent upon us. Our ancestors bravely snatched expiring liberty from the grasp of Britain, whose touch is poison ; shall we now consign it to France, whose embrace is death ? We have seen our fathers, in the days of Columbia's trouble, assume the rough habiliments of war, and seek the hostile field. Too full of sorrow to speak, we have seen them wave a last farewell to a disconsolate, a woe-stung family ! We have seen them return, worn down with fatigue, and scarred with wounds ; or we have seen them, perhaps, no more ! For us they fought ! for us they bled ! for us they conquered ! Shall we, their descendants, now basely disgrace our lineage, and pusillanimously disclaim the legacy bequeathed us ? Shall we pronounce the sad valediction to freedom, and immolate liberty on the altars our fathers have raised to her ? No ! The response of a nation is, "No !" Let it be registered in the archives of Heaven !—Ere the religion we profess, and the privileges we enjoy, are sacrificed at the shrines of despots and demagogues, let the pillars of creation tremble ! let world be wrecked on world, and systems rush to ruin ! Let the sons of Europe be vassals ; let her hosts of nations be a vast congregation of slaves ; but let us, who are this day free, whose hearts are yet unappalled, and whose right arms are yet nerved for war, assemble before the hallowed temple of Columbian Freedom, and swear, to the God of our Fathers, to preserve it secure, or die at its portals !

Acquisition of the Floridas

DECEMBER 15, 1800.¹

Question. Would it be advantageous to the United States to extend their territories?

It might be supposed that a Republic, whose territorial jurisdiction encircles a more extensive portion of the earth's surface than falls to the share of almost any sovereignty in Europe, would never exert her energies for her dominion. It is true, on general maxims, that our country is sufficiently large for a Republican government; but if, by an inconsiderable extension of our limits, we can avail ourselves of great natural advantages, otherwise unattainable, does not sound policy dictate the measure? We reduce the question to a single point: would not the acquisition of the Floridas be advantageous to the United States? Here let it be remembered, that that part of the territory of our government, which lies north of Florida, and west of the Alleghany Mountains, including the north-western territory, Tennessee, Kentucky, and a part of Georgia, is, by far, the most fertile part of the Union. Nowhere does the soil produce in such exuberance; nowhere is the climate so mild and agreeable. The agricultural productions of this quarter, must then, in a few years, become immense, far exceeding those of all the Atlantic States. The next inquiry is, how shall this superabundance be disposed of? How shall the lumber, wheat, and cotton of this country be conveyed to a West India or European market? The only practicable method of transportation is down the Mississippi and the other rivers

¹ Printed in the Proceedings of the Massachusetts Historical Society, 1st Series, Vol. XI., pp. 329-330, from the original manuscript given by Mr. Webster to Mr. T. R. Marvin. It was probably a college exercise, written when Mr. Webster was less than eighteen years old, and twenty-one years before Florida was acquired by the United States.

that run into the Mexican Gulf; and we have here to reflect, that those rivers all run through a country owned by the king of Spain, — a monarch, capricious as a child, and versatile as the wind; and who has it in his power, whenever interest, ambition, or the whims of his fancy dictate, to do us incalculable injuries by prohibiting our western brethren from prosecuting commerce through his dominions. Suppose the Spanish sovereign should, this day, give orders to the fortress of New Orleans to suffer no American vessel to pass up or down the river: this would be an affliction not to be borne by those citizens who live along the banks of the Mississippi; but what steps could our government take in the affair? Must they sit still and fold their hands, while such an intolerable embargo presses our commerce? This would be an ill expedient. We might as well give Spain our whole western territory, as suffer her to control the commerce of it. The only way we could turn ourselves, in this case, would be to declare war against Spain, and vindicate our claims to free navigation by force of arms. Here, then, we are under necessity of extending our territories by possessing ourselves of all the country adjacent those rivers, necessary for our commerce, or of giving up the idea of ever seeing Western America a flourishing country. Therefore, since we are liable every day, to be reduced to the necessity of seizing on Florida, in a hostile manner, or of surrendering the rights of commerce, it is respectfully submitted, whether it would not be proper for our government to enter into some convention with the king of Spain, by which the Floridas should be ceded to the United States.

D. WEBSTER.

Funeral Oration on Ephraim Simonds

DARTMOUTH COLLEGE, August, 1801.¹

No one ever ascended the stage to speak on a more delicate subject than the loss of a companion. It is a subject that admits not the flights of fancy, nor the charms of eloquence.

Little, indeed, is he fitted to cull the flowers of rhetoric, whose bosom still bleeds for the loss of its inmate; whose powers are overwhelmed in a flood of sensibility.

To eulogize kings and heroes, to swell the pomp of courtly oratory, by building up paragraphs of shining and unmeaning panegyric were an easy and an insignificant task; but it is unnatural to aim at brilliant imagery, or elegant diction, "when grief sits heavy at the heart;" hard is it to be formal when we feel, to declaim when we would weep.

We are at this time assembled for one of those solemn purposes, imposed on us by the common lot of our nature. To hear the dull, funeral toll, to mark the vestiges and recount the triumphs of death, ever have been, and ever must be, the mourn-

¹ "A Funeral Oration, Occasioned by the Death of Ephraim Simonds, of Templeton, Mass., a Member of the Senior Class in Dartmouth College, who died at Hanover, N. H., June 18, 1801, æt. 26, by Daniel Webster, a Classmate of the Deceased. *'Is vix sustinuit dicere lingua VALE!'* Hanover: Printed at the Dartmouth Press, April, 1855."

Mr. George Ticknor Curtis in "The Life of Daniel Webster," referring to the Eulogy on Simonds, says: "It is natural, unaffected, full of feeling, and of a strong religious faith. . . . Of course it has not the simplicity which he afterwards reached; there are words which he would have expunged, and sentences which he would not have constructed ten years afterward. But it might, if he had chosen to have it so, been seen by the world at any period of his life, as a not unworthy forerunner of his more mature productions, for it is marked throughout by the elevation of thought, as well as the tenderness of feeling, that belonged to his character."

ful business of mortals. In consequence of that eternal, universal destiny, from which man in vain pleads exemption, we now deplore a loss, too recent to need the powers of recollection, and too deeply pencilled on the tablets in our bosoms, to have its colorings heightened by the dashes of imagination. Simonds, our brother, our fellow traveller to the temple of science, our morning friend, and our evening companion, where is he? He sits not within these walls; his countenance cheers not the speaker. He walks not the aisles of yonder building; he is heard no more in our halls! We approach his late abode on yonder eminence, but no voice bids us welcome! Desolate, and hung with his garments, it is a sad remembrance of our loss. Where then shall we seek for him? In the cool of the evening, when grey twilight shrouds the hamlet, shall we find him arm in arm with a brother? Alas! his brothers are no more to feel the warmth of his hand! Shall we see him hereafter around the board of philosophy, or meet him at the altar of the Muses? He appears there no more forever! Shall we behold him in some sequestered glade, retired from the world, and wrapped in religious contemplation? He is not there,—he has gone, and we see him not again! The storm has overtaken him, it has beaten hard on his temples, and he has fallen!

In the solemn hour of midnight, when the darkness is terrible, and deep sleep falleth on man, the commissioned angel descended from the throne of Jehovah and bore him up to the presence of his Judge.

All of him that was mortal now lies in the charnels of yonder cemetery. By the grass that nods over the mounds of Sumner, Merrill, and Cook, now rests a fourth son of Dartmouth, constituting another monument of man's mortality. The sun as it sinks to the ocean, plays its departing beams on his tomb, but they reanimate him not. The cold sod presses on his bosom, his hands hang down in weakness. The bird of the evening shouts a melancholy air on the poplar, but her voice is stillness to his ears. While his pencil was drawing scenes of future felicity, while his soul fluttered on the gay breezes of hope, an unseen hand drew the curtain, and shut him from our view. The laurels of manhood were just ripening on

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his brow, the principles of future greatness were fast collecting in his bosom, when death, who, like the spouse of Nabis, embraces only to destroy, folded him in its iron arms. With him life's visionary scenes are over, its fancies are fled. The incidents, that chequer our human existence, produce no alteration in his being.

He seeks the land that no disturbance knows,
Where the faint slumber, and the tired repose ;
Where none at partial fortune can repine,
For slave and master on one couch recline ;
Where heroes' vanity and monarchs' pride
Are humble as the beggar at their side ;
Where death impartial spreads a gloom profound,
And right, and peace and silence reign around !

We saw disease stretch him in tortures. With sight half prophetic from the agitation of our feelings, we half perceived the issue. We saw, that the black wing of death must ere long extend over him, that he soon must leave us —

“ And scarce our tongues could say, Farewell ! ”

In vain our attention, in vain our solicitude ! Though anxiety hovered round his bed, and watched the motion of his lips ; though brotherly love strewed the couch and softened the pillow, it availed not ; on the page of the Eternal Will was it written, and Simonds dies !

Thus is man, and thus are his days, weak and helpless — few and transient. He rises in the morn of life, health flushes his cheek, and dances in his veins ; nature salutes him, her lord, and offers him the sceptre, he builds his airy castle, and weaves a web for future years ; but, ere he is aware, the mandate comes and he has but just time to gather his garments, and depart where the great and good have gone before him.

Our friend, therefore, has only trodden the path that all must pursue. He has entered the innermost of the temple of eternity, and left us treading in the vestibule. With the reflection, then, that we soon must follow him, let us resign him into the hands of his Maker. But let us not bury his example with his body. May his virtues ever live in our practice, as his memory ever must in our minds.

Simonds shall never be forgotten. The future child of Dartmouth, as he treads o'er the mansions of the dead, with his hand on his bosom shall point, "There lies Simonds!" and however careless of his eternal being, however immersed in dissipation or frozen in apathy, he shall check, for a moment, the tide of his mirth, and while an involuntary tear startles in his eye, shall read,

"Hic jacet, quem religio et scientia condecoraverunt."

The annalist of our institution shall not deem it beneath the dignity of his story, to turn aside from the details of scientific improvement, and to record, that on the 18th of June, 1801, died Ephraim Simonds; whom all loved, against whom the forked tongue of envy was silent, and the arrows of malignity harmless.

It is not our business elaborately to eulogize, nor our wish to emblazon the memory of the dead with the glare of applause. To those who knew our departed friend panegyric were insipid; to those who knew him not, it might appear vain. Suffice it to say, that his acquaintances recognized, in his person, the gentleman, the scholar and the Christian; in the commerce of life, free and affable; in the walks of literature, inquisitive and sagacious; in the truths of religion, firm and inflexible — looking forward to the high and exalted merit of serving his country and his God. As his religion inculcated the exercise of a noble and ingenuous frankness, the vile sons of craft and duplicity inherited neither part nor lot in his affections.

To surviving friends, gladdening is the reflection that he died, as he had lived, a firm believer in the sublime doctrines of Christianity. He died not like Voltaire, the champion of infidelity, in the anguish of his soul, and with a hell in his bosom; he died not uttering imprecations and blasphemies; he died not in the agonizing tortures of a criminating conscience; but when the lamp of life quivered in its socket, when he perceived the days of his years were completed, the last rational moment of his life was occupied in prayer to Him, whose blood streamed on Calvary, the Immanuel, the Prince of Peace. Whoever knew him in life, and saw him in death, will cordially address this honorable testimony to his memory:

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“He taught us how to live, and, O too high
The price of knowledge, taught us how to die.”

The dignity that invested his character in his late hour, was the endowment of that religion, which ever proves a faithful director in life and a powerful friend in death. When the pride of science, the pageantry of philosophy, the wily arts of cunning and subterfuge, and the parade of hypocrisy all vanish away, religion then, like a protecting seraph, shields her votary from harm, drives from his presence the pale, terrifying spectres of death and despair, and serenely lays him to repose in the bosom of Providence. Religion dissevers the chain that binds man to the dust, and bids him be immortal. It enables the soul to recline on the arm of the Almighty, and the tempest beats harmless around her. “In the smooth seasons and the calms of life,” the worth of religion is not estimated. Like everything else, which has in it the genuine marks of greatness, it is not captivated by the allurements of worldly grandeur, nor the soft, silken scenes of luxury. Amidst the gaiety and frivolity of a Parisian Court, the philosopher of Fernay could curse religion without a blush; Hume, proud of that reputation which his talents acquired him, could play it off in a metaphysical jargon; and Paine disposes of it, with a sneer and a lie. But let religion be estimated by him, who is just walking to the stake of the martyr; by him who is soon to suffer the terrors of the inquisition; by him who is proscribed and banished from his family, from his friends, and from his country. These will tell you that religion is invaluable; and that it gives them comfort here; that it is the earnest of life eternal, the warrant that gives possession of endless felicity.

Whoever, therefore, possesses and practises the pure principles of Christianity, leaves, at his decease, a turbulent, vicious world, for the society of sanctified and glorified beings. How salutary then is the balm of Gilead — how fair the roses that bud on Zion!

While we mourn, let us not mourn for ourselves alone. In sympathy there is nothing selfish nor contracted; animated and benevolent, its rays are diffused as widely as the strokes of affliction are felt. There are scenes still more affecting than

we have witnessed, there are bosoms, whose sorrow is greater than our own. Is any one here whose tears have fallen for a son, or for a brother? Any one, who has felt the heart-rending pangs of a separation of those ties, which nature forms and love corroborates? Go to the shades of Templeton, to the bosom of a family surprised by the tidings of death! Your feelings shall there be arrested by eloquence that nothing can resist, the eloquence of nature, the eloquence of grief. A brother's tears, a sister's sighs shall there waken the sympathetic emotions in every heart that is not steeled in insensibility. Robed in the sable attire of affliction, you shall there behold a mother, whose bosom throbs— You shall see a father—but you have seen. Lowly bending over yonder balustrade you have seen the tear of age trickle down the cheek of a venerable parent. With eyes turned towards Heaven, you have seen the struggle between fortitude and affection shake his frame. You saw, and did you not pity? Did not the manliness of silent grief heave a sigh from your breasts, that ascended with your morning aspirations, and mingled with the hallowed incense of a parent's prayers at the throne of Grace?

But sighs, and tears, and grief are unavailing; they enter not the chambers of death, they resuscitate not from the grave!—To that God, then, in whose hands are life and death, whose throne is established in justice, and the beams of whose mercy illuminate universal being, let us commit our much loved friend, and bid him a cordial and final Farewell!

Peace to his shades! and when the general doom
Shall raise him renovated from the tomb,
Be Grace's white mantle o'er his shoulders spread,
And the Saint's triumph blaze around his head!

BROTHERS OF THE CLASS:

This day completes the Course of our Collegiate studies, and gives us to the world. The hour of separation, ever mournful among friends, whose hearts are united, to us is doubly mournful from the loss of a highly respected Class-mate. Before to-morrow's sun shall go down, we are dispersed. We part, however, with the ardent and consoling hope of meeting once more, and of taking a more solemn adieu on the day of our

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Anniversary. But with Simonds we meet not again! The parting moment is over! He has already pronounced his Valedictory; he flitted on the wings of a seraph; he has commenced his Eternity! Impressed with this reflection, let us retire from this mournful business of the present occasion, and as the last, best tribute we can pay to his ashes, let us subscribe our names, as he did his, to the catalogue of virtue's friends. Let his memory be embalmed on our bosoms, and through every period of our future life, let his image be constantly with us, a monitor to our actions.

May those guardian Spirits, that watch around the just, guide and protect us, together and apart: may Almighty Grace secure us from evil, and energize all our talents in the exercise of Christian morality; and when it shall be said of us, that earth embosoms her sons, may we then be united with our Simonds in that far better country, where the solemn dirge shall be exchanged for the symphonies of Gabriel's harp, and the voice of funeral Eulogy be heard no more!

Oration on Opinion

DARTMOUTH COLLEGE, 1801.¹

AMID the variety presented at this Anniversary, indulge us in asking your attention for a moment to the Influence and Instability of Opinion; a subject, although not entirely new, yet as little hackneyed as any that falls within the sphere of occasional declamation.

In literature, in religion, in politics and in manners we equally recognize the vestiges and recount the triumphs of Opinion. No genius, however sublime or persevering, however discriminat-

¹ "Oration on Opinion, for the Anniversary of the United Fraternity, A.D. 1801." From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society.

In his Autobiography Mr. Webster says: "I was graduated in course, August, 1801. . . . I spoke an oration to the Society of the United Fraternity, which I suspect was a sufficiently boyish performance." On the 16th of August, 1853, the New York Herald published what purported to be an Oration on Opinion by Daniel Webster, with the statement that it was furnished by a graduate of Dartmouth College who had saved a copy of the address. The name of this student is not known and the authenticity of the oration published in the Herald cannot now be clearly established. The Dartmouth Phoenix, however, reprinted it in March, 1857, and said: "By the unanimous voice of the United Fraternity, Mr. Webster was deputed the Commencement Orator. The fame of his previous orations was widely spread, and an unusual number were attracted by the incident of the occasion. The society voted that a copy of the oration be deposited in the archives. A few years since it was missing from the records and supposed to be lost. . . . After Mr. Webster's decease, the oration appeared in a New York paper from which we obtain it."

The manuscript of the oration in the New Hampshire Historical Society differs materially from the New York Herald version, but it has been thought advisable to print the oration from a manuscript in Mr. Webster's own handwriting, rather than from a publication the exact origin of which cannot now be ascertained. A comparison of the two versions shows some passages in the New York Herald copy which are not in the New Hampshire Historical Society manuscript but which are found in the manuscript of an Essay on Woman by Mr. Webster, an early production, which is hardly of sufficient importance to be printed here.

ing or accurate, but has found itself, in a degree, baffled and perplexed by the authority of custom and the imposition of names.

Minutely to mark all the wanderings of sentiment would be endless, or, if not endless, impossible, since it would require us to run through the catalogue of human errors ; but to point at instances, in which Opinion assumes the purple and dictates with imperial authority, may, perhaps be not unentertaining from the subject, though not embellished by the flights of genius, nor decorated with the efflorescence of Oratory.

We want not proof that man was made for improvement and excellence. His faculties, his feelings, his capability of investigation, and the variety of knowledge within the circle of his attainment, all concur in declaring to us, that human nature has in it the germs of greatness. We know, at the same time, however, that the dreams of enthusiasts, the golden age of science, the time when the apex of possible perfection is attained, never has been, and probably never will be realized. The ardent philanthropist of every age looking forward through the perspective of future years, beholds, in his imagination, human nature rising like a pyramid, and the arts and sciences progressing without relapse or essential retardation.

But this is all delusion and a dream, the cobweb of fancy, brushed away by the essays of experience ; [the] majority of mankind are still in ignorance ; as one nation rises to civilization, another sinks into barbarism ; as art or science finds encouragement and cultivation, another is neglected and despised. To impute the direct causes that have thus retarded the progress of man, to moral depravity alone, might argue too great severity of stoicism. Various [causes] undoubtedly contribute their force. Impatience of enquiry, peculiarities of temper, attachments and connexions, and among the rest, the corruption of the heart, have all their respective influence. But more consequential and pernicious than all these, is the blind obsequiousness to received Opinion, taking things at second hand and admitting them into a creed without care or examination ; or on the other extreme, that infatuated love of novelty, which hurries us from one thing to another without order or control. These two extremes are produced by the same cause, operating

in different ways. For the same feelings which tie a man down by dogmas which he receives from prescription, will, in every other freak of fancy, drive him from all his positions and bear him away into the new, the striking and the brilliant. Thus Opinion works wonders, without enlisting, as auxiliaries, other passions than the admiration of antiquity or novelty. Men will be too fond of old things or of new; and as the authority of the great and illustrious, or their particular caprice attaches them to the former or the latter, reason cannot prevail on them to relinquish their tenets. Hence a free, candid spirit of enquiry, a determination to appeal to self judgment, to discard, and reject each old and new absurdity, to retain and adopt each old and new improvement, has seldom prevailed in any age or nation.

Who ever is read in the history of literature has seen this; has seen men relinquish the decision of their own understandings, travel through all the mazes of erratic Opinion and forsake the probability of attaining truth for the certainty of running into error. In one age a literary champion comes forward, broaches a new theory, and attempts to support it with the subtilities of scholastic disquisition, or render it plausible by the flowers of rhetoric. One half the age anathematize him as an unprincipled innovator, while with the other his Opinion becomes literary law; to doubt it, is heresy. But, ere long a new systematizer appears, attacks the former doctrine and perhaps destroys it by argument, or overthrows it by ridicule. Pæans are immediately shouted to him as the great emancipator from prejudice, the restorer of true knowledge, a new-created sun in the firmament of science.

But amidst the bustle of applause, pushed on by order of discovery, he overshoots the mark, and carries mankind into the other extreme. True indeed, in mathematical philosophy, we have a few truths from demonstration, which may constantly serve as rallying points to our speculations. In the plainer parts of metaphysics, too, we have certain knowledge; since the existence of a God, and some other propositions are as clearly demonstrable as any theorem in Euclid. But so soon as we step without the sphere of demonstration, we are embarked on an ocean, without pole star or compass.

There can be no better exemplification of the contradiction of sentiment on a subject of science, than the contest between the material and ideal philosophers. The former, conversant with speculations about external bodies, lugged all their materialism into the doctrine of spirit. With them spirit must occupy space, can receive no impression without contact — there can be no thought without images, and in short, the soul, and even Deity must be material. The absurdities of this system being at length exhibited, its reformers, in their thirst for novelty, overreached all the bounds of common sense, and concluded we had no evidence of the real existence of any thing. A most extraordinary discovery indeed, and worthy the great geniuses that produced it! Common abilities could never conceive so great an inconsistency. It requires refinement and absurdity to draw such an inference from the premises that exist around us. Who, of less talents than Berkley could ever convert hills and rivers into *tumified and aqueous ideas*? Or who but he, could pull the sun from his sphere by an argument of logic and place a *burning idea* in his stead? Who, less than the fashionable Hume, after writing volumes on volumes of history, could set himself down to convince us that he had only been telling an Utopian tale; that his revolutions and conspiracies were mere creatures of fancy; that his Henrys and his Edwards were nothing but *resemblances*, and that he himself, in the height of his reputation, was, at best but a *scribbling idea*? As these philosophers were proof against the usual methods of conviction, their theory, however obviously inconsistent, was not easily refuted. But the practical part of their system exposed them to ridicule. Though they might tell us that mountains and seas, and temples were but *ideas*, yet a child of this doctrine, who had broken his skull upon a stone, made a contemptible figure in saying that he had beaten his brains out against an *idea*. But the fashion of this world passeth away, and Berkley and Hume and all their *ideal* associates are hastening to forgetfulness.

In religion, the triumphs of Opinion and prejudice are no less splendid than in science. Look through the ages of Christianity, read the history of the persecutions, proscriptions, excommunications, beheadings and burnings that have harassed and de-

stroyed the Protestants, and you will acknowledge that the colossal monument of religious tyranny has threatened to crush humanity. The princes and hierarchs of Europe have committed enormities at which human nature relents ; and all under the specious pretext of supporting religion. But does religion delight in massacre and bloodshed ? Is it propagated by fire, sword and desolation ? Did religion suggest the edicts that banished the Huguenots of France ? does it glow in the thunders of the papal see ? does it stream in the blood of the inquisition, or ascend with the flames of martyrdom ? Did it wave the banners of the Cross over the South Americans, and drench in blood the plains of Mexico and Peru ? Was it religion, or was it a holy phrenzy that originated the crusades, and laid waste the regions of Palestina ? Or, on the other extreme, is religion emblazoned on the pasquinade at the palace of the Tuileries, which decrees death to be an eternal sleep ?

Is devotion monopolized by the inhabitants of a dull, gloomy forest, or shut within the dreary walls of a convent ? Has religion avowed open hostility with the passions and feelings of nature — passions and feelings which man receives from his God ? Behold the crippled pilgrim hobbling o'er mountains, and crossing extents of ocean, to bow and worship on the desolated ruins of Jerusalem ; or wading through the blistering sands of Arabia, to bend before the tomb of Mahomet, and adore a delusion ! Are these the dictates of rational religion, or is it superstition, whose throne is girded in Ereban blackness, that belches forth these mists to benighten the intellect ?

As we approach the world of politics, we enter in a region where Opinion has performed its greatest achievements ; where it has started beyond the bounds of common reason, and pushed itself onward with the most eccentric flights of the human mind. What a difference between the political sentiments of this day, and those entertained two centuries ago ! Man was then torpid and unfeeling under the thorny lash of oppression. A slavish dependency, and unconditional devotion to the will of his master, were his boast and glory. Slothful and inactive, ignorant and incapable of self judgment, he approached and prostrated himself at the throne of power, to receive at the same time his political creed and his religious principles.

These were the disgraceful feelings and sentiments that brutalized the mind under the reigns of the Stuarts and the Bourbons. Nothing then was heard but the "divine rights of Kings!" — the rights of kings, to tyrannize and oppress — to proscribe and persecute — The rights of kings to barter their subjects like cattle — to war with each other till they destroy the inhabitants of half the globe! — to transport armies into the forests of Asia and America, and bear destruction to the hut of the savage! The rights of kings, to commit to the Tower and the Bastile, the scaffold and the grave, without even the ceremonies of a trial! Shocking, indeed, must be the degradation of the human mind, when such sentiments find advocates, and such outrages impunity!

From this state of decrepitude and despondency, this abysm of slavery and wretchedness, man at length arose and like a bird just loosed from the snare, sought for safety in the opposite extreme. While he built an enormous mound to secure him from the approaches of the tyrant; while he entrenched himself in constitutions and compacts with his sovereign, and boasted in having erected sufficient barriers against the encroachments of prerogative, he unwarily left himself exposed to the attacks of that licentiousness, that disarms and dissipates, that unnerves and hebetates the energies of the mind. Thus one extreme alternates with another, and from a superstitious rigidity, man falls away to a wicked laxity of principle. The "divine rights of kings" was perhaps as significant in the seventeenth century, as the "imprescriptible rights of man" in the nineteenth. That man, as a child of God, and a member of society, has rights essential and intransferable, is a truth; and a dear truth to the lovers of rational freedom. But that modern Opinion has annexed significations to the phrase, ridiculous and subversive of general happiness, can be denied only by fools and fanatics. These new-fangled rights of men, according to the definitions of the theorists of the day, have, in themselves, just as much meaning as the substantial forms of Aristotle; but in their consequences they have proved the wrongs of human nature, and destruction of the species. They are taught amidst the orgies of a civic feast, and propagated at mouth of cannon, and point of the bayonet. They have these ten years shaken

Europe to its centre, and the distant murmurings of the tempest they occasion, have been heard on the shores of Asia and America. They are planted on the blood-moistened soil of Germany, in the lowlands of Belgium; they are fostered amidst the howling desolations of the mountains of Switzerland; they are burning with the spires of Italy. They have transported the veterans of Europe into Africa, and are now swelling the Nile with the mixed blood of three quarters of the globe! They were cherished by a sea breeze off the Cape St. Vincent, at the Texel, in the bay of Aboukir and before Copenhagen.

But the rights of man are not the only novelties ushered in at the close of the last century. Woman also comes forward to prefer her claims, and she finds an advocate. The greatest innovations on the antiquated systems of government, the grandest illuminations which the new school has flashed on our eyes, are to be found in the writings of Mary Wolstoncraft, the unsexed authoress of the "rights of Woman." Mary has exercised her talents to raise the female mind from the mires of ignorance and the toy shops of vanity, and to give it dignity and character!

Here we might remark the great difference of Opinion on the subject of female education. Ask a North American the proper business of Woman, and he shall tell you it is the drudgery of his cornfield; an Asiatic, and he answers, to burn herself on the funeral pile of her husband; a young Parisian, and he says (to be sure) to become an earthly goddess, illuminated and indescribable; to pursue the fashions, and to read a novel. But ask Mary Wolstoncraft, and she shall tell you a quite different story. She will have women legislators and magistrates, representatives to Congress, and ministers plenipotentiary. Instead of their toilette and their volume, she would have [them] spend their hours over French and British treaties; and instead of calculating their pin money, they are to become financiers to a nation.

It is not enough that the female can produce works like those of Moore or Morton; that the whole garden of Science lies open and invites the tender culture of their hands, but Mary would launch her sex indiscriminately on the ocean of politics, deep, rocky and tempestuous.

But let us turn from theory to practice, from the lucubra-

tions of Mary to the history of her life, and we shall find that prostitution and infamy are the "issue of the new system, certain, inevitable, irreversible." Opinion, in modern times, effects much by the magic of names. Some pompous title is sought for in the verbiage of empty declamation, and men are imposed on by sound for want of sense. Philosopher is an appellation, now appropriated to the most insignificant scribblers in existence.

Socrates and Plato were true philosophers—they were emphatically "lovers of wisdom." But had it been their allotment to live in the present age, their ideas would have been enlarged or they been pointed at as sons of delusion, and advocates for the reign of terror. Sons of delusion—because they believed the soul immortal—and advocates for the reign of terror, because they thought the malefactor should be punished. But who, that has the feelings of a man, who that has claims to common intelligence that would not despise to hear himself named philosopher, and to bear the title in common with the hosts of the day? William Godwin has told us, that there is no more propriety in punishing the guilty than the innocent; that the necessity of sleep in animal bodies would ere long be suspended; and that as the knowledge of physic progressed, man would be immortal on earth. These things were new, and astonishing; and they were sufficient. Godwin has immediately thirty notes of admiration suffixed to his name, and is set down for a *philosopher*!

Paine declared that revelation was a forgery; a masterly exertion of priestcraft and deception. This sufficed for him, and though staggering with intoxication, the doors are thrown open, he is by many admitted to the superb palace of philosophy, and directed to a seat at the right hand of Godwin.

The process of becoming a philosopher of the new kind is plain and easy. Let any man revile Christianity, let him exercise an uncontrollable and unconquerable malevolence to the clergy, and spin out some new political theory, Opinion immediately announces him a convert to reason, and decorates his temples with the garlands of philosophy. A swarm of disciples gathers around him, and shouts in the language of Lucullus, "*cedite Romani, cedite Graii!*"

These are the illusions of Opinion; thus does it sport with

the imbecility of our nature, till it makes beings of perpetual change. Instead of the light of truth it displays to us an *ignis fatuus*, that bewilders our way, and wearies our steps; that leads into difficulties and entanglements, then vanishes away and leaves us in the dark.

The man, who can keep himself from all these aberrations is truly and characteristically great. Whoever can stand amidst the turmoil of passion and prejudice, amidst the conflict of the winds and waters of party and opinion, has more durable wreaths for his fame, than were ever woven in the schools of the new philosophy. This character was possessed, in a degree, by Locke and Newton. Though subject to errors, like other men, they had that consciousness of their own powers, that rendered them adequate to high improvements in science. Nor would an American here fail to add the name of Washington; a name far excelling that of the Roman Cincinnatus. If there was a single trait of excellence in his character, it was this dependence on his own exertions, and rejection of the phantasms of Opinion. Washington had been just as great a man as he was, if the plains of Monmouth, the streams of Brandywine, or the walls of Yorktown had never existed. For his greatness was altogether internal; it consisted in a regular and compacted system of passions and powers arranged in a manner that gave him, at once, energy and moderation; and the brilliant achievements were only the outward expressions of what existed in his mind. Self collected, he could stand unmoved in "the rocking of the battlements;" was a bulwark in the "iron front of war;" and a guardian and guide in the councils of his country.

With such examples before us, let us endeavor to collect principles, that may direct us in a path which leads not into the mazes of Opinion; let our sentiments be immovable by any other powers than truth and conviction; and let neither tergiversation nor seduction attach us to the systems of those opinionated visionaries, who mistake the fantastic dreams of their own minds for the oracles of philosophy.

GENTLEMEN OF THE SOCIETY,

Occasions like the present have commonly called from your orator a valedictory address; and perhaps there are few periods

in life, when the sympathies of nature are more irresistibly excited. Science unites the hearts of her votaries, and when they have paid their incense together on her altars, a separation is painful, and agonizing. But indiscriminately to address such a mixed assemblage as now celebrate our anniversary, were unapt and incongruous. Among you are those who have long since advanced beyond the years of their pupilage, and are now high in the ranks of honor and eminence. We consider *you*, Gentlemen, as our patterns and directors; we consider your names as doing honor to our registry, and we are confident, that if in us, your younger brothers, you find any genius, if you find any merit, they will meet your patronage and reward. And though engaged in the active employments of life, in the service of God and our country, you will yet cherish the remembrance of this Institution, where you first sipped the dews of instruction, and tasted the sweets of science.

Our Brothers, who have longer here to continue, will accept our gratulations on the respectability of their standing. Persevere in industry and improvement, and you may expect the completion of your wishes. Let your conduct be open and manly, and never bow to those contracted notions, which would tie you to sect or party; be lovers of virtue and excellence, and foes to vice and meanness, wherever found or by whomsoever possessed. Opinion has told you that College is the temple of fame; that the academic amaranths bestowed by an University will blossom forever. But this is a mistake. The laurels of fame are reaped in more extensive fields; in scenes of hazard and danger; or earned by a life of labor and contemplation. For these things be prepared, and look forward with a noble and virtuous emulation. Those of us who are now about to leave you, and to step on to a new scene in the drama, have emotions which we cannot express. We proffer you our tenderest feelings, our sincerest affections; and as the dearest pledges of our confidence, we commit to your guardianship the constitution of the Society, the pages that infold our friendship. Wherever we may be called, to scenes of prosperity or misery, peace or war, our prayers will constantly ascend for your felicity.

Happy were it, if these observations could close our subject.

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But, Alas, the badges you assume would remind, if it were necessary, that the most painful, the most agonizing part of our duty remains unperformed ! You are now to carry back your mind to that distressful period, when the ravages of death tore from our bosoms a brother and a friend. You remember that Simonds fell in the morn of manhood ; you remember the agony of your spirit as you followed his pallid corpse to the grave.

“ The turf tear-moistened, the dull cypress gloom,
And every sad appendage of the tomb,”

will ever live in your recollection, and your united affections will bless his memory. Simonds has set an example ; be it ours to learn wisdom ; like him let us be virtuous, like him let us be religious, and meet him again in realms of blessedness ; and as he here bade us welcome to his friendship, so there he shall again acknowledge us, and with the smile of an angel address us, “ Welcome, my Brethren ! ”

Oration

July 5, 1802.¹

It is at that season when nature is dressed in her pleasantest apparel; when the earth beneath the hand of Industry has become one vast green altar of incense, that the citizens of our Country assemble in their several temples to commemorate the birth-day of their freedom. America, first in national happi-

¹ From a manuscript, in Mr. Webster's handwriting, in the New Hampshire Historical Society. The title "Oration July 5th 1802" is in another hand. The Fourth of July occurred on Sunday in that year. In his Autobiography Mr. Webster stated that he delivered a Fourth of July oration at Fryeburg in 1802, and what has always been supposed to be the Fryeburg address was published, in 1882, by A. F. and C. W. Lewis.

Although that address has some passages which are identical with or similar to the New Hampshire Historical Society manuscript, upon the whole the two addresses are very different. Thomas P. Hill, a pupil of Daniel Webster when he taught at Fryeburg, wrote to Prof. Sanborn November 25, 1852, that the only sentence in the Fryeburg address which had not escaped his memory, related to the Constitution. It was this: "If the Constitution be picked to pieces, piecemeal, it is gone, as surely and as fatally gone, as though it had been struck down by one resistless blow."

The New Hampshire Historical Society manuscript contains this passage: "*If the Constitution be picked away by piecemeal, it is gone* — and gone as effectually as if some military despot had grasped it, at once trampled it beneath his feet, and scattered its loose leaves in the wild winds." The words printed in italics are much closer to those quoted by Mr. Hill than anything in the Lewis version. Mr. Webster may have made two drafts of his Fryeburg address, but if so it is impossible to determine which one he delivered. The Speech as printed at Fryeburg, in 1882, follows this in the present volume, so that the two may be compared.

Mr. Webster mentions four Fourth of July orations, — not including the one at Hanover, printed in this volume, viz.: "At Fryeburg, 1802; at Salisbury, 1805; at Concord, 1806, which was published; and at Portsmouth, 1812, published also." The Salisbury oration has not been found.

ness, is first also in gratitude. On this day she pays homage to God for his goodness, and renders praises to those heroes who accomplished her revolution as distinguished as their deeds. While compassion weeps over the miseries of three quarters of the globe; while the barbaric ignorance of Africa, the pageant slavery of Asia, and the kingly robberies and despoilings of Europe call from humanity a tear, America exults in her own felicity. She beholds herself possessed of every natural and political blessing. Her rights are founded on the ample charta of Providence, and secured by the valor of her arms. The extent of her territory embraces the most salubrious climes; The richness of her fields and the splendor of her cities rival the boasted gardens and capitals of Europe; her commerce floats in every gale and mingles with each quarter of the globe, while the increase of her population and wealth outrun calculation and almost mock arithmetic. Such, my Countrymen, are the joyful circumstances under which we convene for social festivity; such, ye venerable patriots are the rich rewards of your toils, your hardships and your dangers. Such the consequences of that fortitude, which on the Fourth of July, 1776, induced you to pledge yourselves before God and the world to be free. That scene was doubtless one of the most solemn and august which mankind has ever witnessed. The inhabitants of a few infant colonies braving the mightiest monarchy on earth! Wherever they turned their eyes they saw monuments of the power of Britain. France and Spain, deeply wounded by her recent victories had retired from before her in sullen silence. Her flag waved in triumph over every ocean and the extent of her conquests bade a bold challenge to the empires of antiquity. With her right hand she had seized on a portion of this Western world larger than the whole of Europe; while she reached her left across the Eastern continent and imposed the shackles of commercial dependency on twenty millions of people on the remote shores of Asia. Gloomy, indeed, were the prospects of America. Oppressed and persecuted, she had no hopes but in her own resources. On the one hand she beheld the frowns of Britain, dark, vindictive, and dreadful. She saw that nation which had lately chastised the world, springing upon her disobedient colonies and crushing them

to atoms. On the other, she beheld the horrors of perpetual slavery. Painted in imagination, she saw the frightful form of Despotism, clad in iron robes, reclined on a heap of ruins, in his left hand taxation,—his right grasped the thunders. She saw posterity rise up and imprecate curses on their ancestors for the tameness of their spirit. Here our Country made a pause, but it was not the pause of submission nor despondency; it was neither the cold stupefaction of guilt nor the trepidation of cowardice. But it was the solemn hesitation which great minds feel when about to enter on “the scenes of untried being.” America deliberately “counted the contest, and saw nothing so dreadful as voluntary slavery.” Appealing therefore to Heaven for the rectitude of her motives, she resolutely dared the unequal conflict. Cool and dispassionate, she stood collected in her own strength. Like the morning sun, she was calm, serene, majestic; her course, like his, brightened as she rose, and victory was matured by her meridian beam.

The events which immediately preceded and followed the declaration of Independence, irresistibly hurry back our minds to that period. The Fourth of July can never be celebrated without recurring to the scenes of the revolutionary war. The labors, the sufferings, the bloody battles can never be forgotten. They will long be remembered by those veterans who felt the fury of the war; who saw cities in flames or trod among their ashes; who heard the deep groan of death, and with a true soldier's spirit wiped the silent tear from the cheek of the houseless orphan; they will long be remembered by their offspring who are proud in the patriotism and renown of their ancestors. The lapse of years does not efface the impression of ancient times. At this distant period, who can hear the story of Bunker's hill without emotion? Who, without feeling all the youthful hero in his bosom, can be pointed to the rising mound, where Warren fell the first martyr to his Country? Contemplate for a moment the forlorn situation of our affairs in the autumn which followed the declaration of Independence, view the shattered remains of our army retreating thro' the Jerseys; pressed by a conquering foe—marched this way to-day, countermarched to-morrow without provision, without clothing,—chilled by the northern blast, their marches traced

in blood, without shelter from the storms of heaven ; without shelter from the more dreadful storms of the enemy. — Can the man be found to review these scenes, and not shed a tear over the past sufferings of his Country. Yet a ray of hope breaks in on the darkness of despondency. There is a point of depression beyond which human affairs are not allowed to proceed. Washington at once converts this defeated remnant into a conquering legion. His genius arrests the awards of fortune and woos back victory to his standard. In despite of the elements, in despite of the united conflicts of winds, waters and enemies, he crosses the Delaware, falls upon Trenton and subdues beneath his arm the hirelings of Germany.

From these scenes our imaginations are carried over those of less importance to behold the boastful champion of the North. Raging like the wind, Burgoyne issues from Canada with an army of soldiers and half an army of titles ; as if the might of omnipotence were his, he already beholds America humbled at his feet in dust and ashes. Champlain received him, and he thinks almost bends beneath the load of his offices and his greatness. His proclamation, swelled with a long list of honors, and puffed with the bugbears of terror, threatens nothing less than destruction, immediate and inevitable. Yet the plains of Saratoga convinced the mighty hero that splendid epithets and lordly titles were poor implements of war ; and that all the stars and garters in his master's gift were sorry defences against the cold thrust of a rusted New England bayonet. The victory at Bennington which was the prelude to that at Saratoga, excited and deserved the admiration of the world. That a handful of farmers just collected from their cornfields, uninstructed in the arts of human butchery, without a single cannon to annoy the enemy, with no bulwarks but their bosoms, should march serenely up to the lines of a veteran army, attack, defeat, slaughter and disperse it, will scarcely be credited by posterity. Those events were the commencement of a series of successes which finally terminated in the happy scene of Yorktown. America then saw an end to her disasters ; the peace descending as from heaven, and rapturously hailed the bright harbinger of her happiness. The roar of cannon now dies away on the ear ; the voice of the enemy is heard no

more, cities rise fairer from their ashes; commerce displays her whitened sheets and joy lights up the countenance lately clouded by the gloomy horrors of war.

Having thus rapidly dilated on the prosperity resulting from Independence, and counted its cost, it becomes us, my fellow citizens, on this day ever hallowed to Liberty, to survey the ground of our national standing; to enquire if the privileges we possess are worth preserving and to reflect on the means requisite for their perpetuation. Americans are possessed of a Constitution free in its principles and successful in experiment; uniting in itself the wisdom and experience of all ages and all nations. It is a Constitution of their own choice; and wisely adapted to the circumstances of the Country. Not dictated to them by an imperious Chief Consul like those of Holland and Italy; not springing from the deformity of the Feudal system like those of Sweden, Denmark and Russia; not encumbered with a lazy load of aristocracy like that of England, nor based in the blood of two millions of people like the military despotism of Republican France; but adopted by a whole community, calmly deliberating on the best means for their happiness. This Instrument is the bond of our union and the charter of our rights. To its operation we are indebted for our national prosperity, happiness and honor. It raised us from a state of anarchy and misrule; reconciled the jarring interests of individual states, and matured the fair fruits of Independence. To the preservation of this Constitution every system of policy should ultimately tend. It should be considered as the sacred and inviolable palladium, ready to wither that hand which would lay hold on it with violence. Whatever variety of opinion may exist on other subjects, on this there must be but one. Whoever does not wish to perpetuate our present form of Government in its purity, is either weak or wicked; he cannot be the friend of his Country. Whether he wishes to behold America prostrate before a throne or set afloat on the stormy ocean of democracy, his principles are equally dangerous and destructive.

The first pillar in the temple of Republicanism is correct and stable morality. All Republics are predicated upon this principle; without it they cannot exist. Without virtue,

honesty and tolerance in rulers, and obedience and respect in people, Constitutions are waste paper and laws a mockery. When ambition, wild and lawless, seizes on the citizen entrusted with Government, when licentiousness diffuses itself thro' the community and corrupts the sources of power, that Republic is doomed to destruction. Mounds of paper and parchment cannot arrest its progress; the voice of reason will be drowned and Liberty expire. Over men void of principle laws have no force when they can be transgressed with impunity. If you can stay the current of the ocean by a bulrush, then may you impede the course of an aspiring, triumphing demagogue by throwing in his way the laws of his Country. A power of restraining the tumultuous passions of the human heart is found only in the dictates of solid morality; this therefore is as necessary to Republican Governments as blood to the Constitution of man. Morality rests on religion; they cannot be separated; if you pull away the foundation, the superstructure must fall. However plausible may be a theory of moral and rational philosophy, in practice it proves itself a chimera. Our magnanimous sister Republic on the other side of the water will therefore pardon us if we do not follow her sagacious example in voting that God does not exist. She will allow us to be so puritanical, old-fashioned, and superstitious; such dull scholars in the schools of Deism and improvement as to believe the time will come when men must stand or fall by their actions, and to add the force of this belief as an incentive to good conduct. Next to correct morals a watchful guardianship over the Constitution is the proper means for its support. No human advantage is indefeasible. The fairest productions of man have in themselves, or receive from accident a tendency to decay. Unless the constitution be constantly fostered on the principles which created it, its excellency will fade and it will feel, even in its infancy, the weakness and decrepitude of age. Our form of government is superior to all others, inasmuch, as it provides, in a fair and honorable manner for its own amendment. But it requires no gift of prophecy to foresee that this privilege may be seized on by demagogues to introduce wild and destructive innovations. Under the gentle name of amendments changes may be proposed which, if unresisted, will under-

mine the national compact, mar its fairest features and reduce it finally to a dead letter. It abates nothing of the danger to say that alterations may be trifling and inconsiderable. If the Constitution be picked away by piecemeal, it is gone—and gone as effectively as if some military despot had grasped it at once, trampled it beneath his feet and scattered its loose leaves in the wild winds. It is not contended that our Constitution is incapable of all amendments, or that it bears the stamp of divine perfection. It is indeed the work of man, and like the rest of his works is liable to error. Yet essential errors it cannot possess; the unexampled prosperity of the Country forbids the idea; and if it have inconsiderable errors they had better, even be revered, than its worth not duly appreciated. To alter the Instrument which ties together five millions of people, on which rests the happiness of ourselves and posterity, is an important and serious business, not to be undertaken without obvious necessity, nor conducted without caution, deliberation and diffidence. The politician who undertakes to make changes in a government with as much indifference as a farmer sets about mending his plough, is no master of his trade. However easy it may be to hack away one provision and one institution after another, he will find it impossible to supply their place, and what came to his hands a fair and lovely charter, will go from them a miserable piece of patchwork.

Gratitude to approved public officers is the duty of a good citizen and becoming the dignity of a freeman. Yet [it] is not generally among the virtues of Republics. Aristides and Camillus and a host of others, ancient and modern, are proof of the remark. But shall America imitate the faults and the vices of other nations? Shall the vast volume of experience be to her an unprofitable lesson? will she suffer her worthiest children to be traduced and maligned? Shall calumny enter the shades of Quincy and blast the character of that man to whose eloquence in Congress we owe the celebration of this day? shall the name of Adams be united to tyranny, oppression, and aristocracy, and handed down with them to the damnation of posterity? Forbid it honor! forbid it decency! forbid it gratitude! Let the man have no punishment but his

conscience who can wish to cloud the evening of that life uniformly devoted to the good of his Country. Americans, high spirited and manly, will despise such baseness; they will cultivate a grateful and affectionate regard for their public agents, and submit abuse and calumny to the stones and dirt. They will remember, that on the event of their government is pendent the fate of other ages, and other nations. It is considered as the grand experiment which is to assure the practicability or impracticability of free Constitutions. If it should go on from prospering to prosper, if it should continue to ride on the high wave of honor and happiness the monarchies of the East will gradually tumble away. The diffusion of Literature and Liberty will sap their foundation, and mankind will at length respire from the persecution of kings. But if the American Government is destined to tread in the track of its predecessors; if it shall be found too feeble to resist the thunderbolt of "Despotism and the more terrible earthquake of democratic commotion," then Farewell to the prospect, the bright, the charming, the fascinating prospect of Liberty and Republicanism! Ye tyrants, then enjoy in safety your bloody triumphs over humanity! Ye wretched victims of despotism, bound and fettered, lie down and lick your chains in despair! But let us hope the event will be propitious; that our government will long continue, a renowned and matchless instance of human wisdom and Republican virtue; and as its morn in '76 was dark and gloomy, that its noon will be bright and illustrious; and when the angel announces that time is no more, may it go down in cloudless majesty, like the mild radiance of the setting sun!

Fourth of July Oration

FRYEBURG, 1802.¹

FELLOW-CITIZENS: It is at the season when nature hath assumed her loveliest apparel that the American people assemble in their several temples to celebrate the birthday of their nation. Arrayed in all the beauties of the year, the Fourth of July once more visits us. Green fields and a ripening harvest proclaim it, a bright sun cheers it, and the hearts of freemen bid it welcome. Illustrious spectacle! Six millions of people this day surround their altars, and unite in an address to Heaven for the preservation of their rights. Every rank and every age imbibes the general spirit. From the lisping inhabitant of the cradle to the aged warrior whose gray hairs are fast sinking in the western horizon of life, every voice is, this day, tuned to the accents of Liberty! Washington! My Country!

Festivals established by the world have been numerous. The coronation of a king, the birth of a prince, the marriage of a princess, have often called wondering crowds together. Cities and nations agree to celebrate the event which raises one mortal man above their heads, and beings called men stand astonished and aghast while the pageantry of a monarch or the jewelled grandeur of a queen poses before them. Such a festival, however, as the Fourth of July is to America, is not found in history; a festival designed for solemn reflection on the great events that have happened to us; a festival in which freedom receives a nation's homage, and Heaven is greeted with incense from ten thousand hearts.

In the present situation of our country, it is, my respected fellow-citizens, matter of high joy and congratulation that there

¹ From the Fryeburg Webster Memorial, by permission of the publishers, A. F. & C. W. Lewis, Fryeburg, Me.

is one day in the year on which men of different principles and different opinions can associate together. The Fourth of July is not an occasion to compass sea and land to make proselytes. The good sense and the good nature which yet remain among us will, we trust, prevail on this day, and be sufficient to chain, at least for a season, that untamed monster, Party Spirit—and would to God that it might be chained forever, that, as we have but one interest, we might have but one heart and one mind!

You have hitherto, fellow-citizens, on occasions of this kind, been entertained with the discussion of national questions; with inquiries into the true principles of government; with recapitulations of the War; with speculations on the causes of our Revolution, and on its consequences to ourselves and to the world. Leaving these subjects, it shall be the ambition of the speaker of this day to present such a view of your Constitution and your Union as shall convince you that you have nothing to hope from a change.

This age has been correctly denominated an age of experiments. Innovation is the idol of the times. The human mind seems to have burst its ancient limits, and to be travelling over the face of the material and intellectual creation in search of improvement. The world hath become like a fickle lover, in whom every new face inspires a new passion. In this rage for novelty many things are made better, and many things are made worse. Old errors are discarded, and new errors are embraced. Governments feel the same effects from this spirit as everything else. Some, like our own, grow into beauty and excellence, while others sink still deeper into deformity and wretchedness. The experience of all ages will bear us out in saying, that alterations of political systems are always attended with a greater or less degree of danger. They ought, therefore, never to be undertaken, unless the evil complained of be really felt and the prospect of a remedy clearly seen. The politician that undertakes to improve a Constitution with as little thought as a farmer sets about mending his plow, is no master of his trade. If that Constitution be a systematic one, if it be a free one, its parts are so necessarily connected that an alteration in one will work an alteration in all; and this cobbler, however pure and honest his intentions, will, in the end, find that what

came to his hands a fair and lovely fabric goes from them a miserable piece of patchwork.

Nor are great and striking alterations alone to be shunned. A succession of small changes, a perpetual tampering with minute parts, steal away the breath though they leave the body ; for it is true that a government may lose all its real character, its genius and its temper, without losing its appearance. You may have a despotism under the name of a republic. You may look on a government and see it possess all the external essential modes of freedom, and yet see nothing of the essence, the vitality, of freedom in it : just as you may behold Washington or Franklin in wax-work ; the form is perfect, but the spirit, the life, is not there.

The first thing to be said in favor of our system of government is that it is truly and genuinely *free*, and the man has a base and slavish heart that will call any government good that is *not free*. If there be, at this day, any advocate for arbitrary power, we wish him the happiness of living under a government of his choice. If he is in love with chains, we would not deny him the gratification of his passion. Despotism is the point where everything bad centres, and from which everything good departs. As far as a government is distant from this point, so far it is good ; in proportion as it approaches towards this, in the same proportion it is detestable. In all other forms there is something tolerable to be found ; in despotism there is nothing. Other systems have some amiable features, some right principles, mingled with their errors ; despotism is all error. It is a dark and cheerless void, over which the eye wanders in vain in search of anything lovely or attractive.

The true definition of despotism is government without law. It may exist, therefore, in the hands of many as well as of one. Rebellions are despotisms ; factions are despotisms ; loose democracies are despotisms. These are a thousand times more dreadful than the concentration of all power in the hands of a single tyrant. The despotism of one man is like the thunderbolt, which falls here and there, scorching and consuming the individual on whom it lights ; but popular commotion, the despotism of a mob, is an earthquake, which in one moment swallows up everything. It is the excellence of our government that it is placed in a proper medium between

these two extremes, that it is equally distant from mobs and from thrones.

In the next place our government is good because it is practical. It is not the sick offspring of closet philosophy. It did not rise, vaporous and evanescent, from the brains of Rousseau and Godwin, like a mist from the ocean. It is the production of men of business, of experience, and of wisdom. It is suited to what man is, and what it is in the power of good laws to make him. Its object — the just object of all governments — is to secure and protect the weak against the strong, to unite the force of the whole community against the violence of oppressors. Its power is the power of the nation; its will is the will of the people. It is not an awkward, unshapely machine which the people cannot use when they have made it, nor is it so dark and complicated that it is the labor of one's life to investigate and understand it. All are capable of comprehending its principles and its operations. It admits, too, of a change of men and of measures. At the will of a majority, we have seen the government of the nation pass from the hands of one description of men into those of another. Of the comparative merits of those different men, of their honesty, their talents, their patriotism, we have here nothing to say. That subject we leave to be decided before the impartial tribunal of posterity. The fact of a change of rulers, however, proves that the government is manageable, that it can in all cases be made to comply with the public will. It is, too, an equal government. It rejects principalities and powers. It demolishes all the artificial distinctions which pride and ambition create. It is encumbered with no lazy load of hereditary aristocracy. It clothes no one with the attributes of God; it sinks no one to a level with brutes: yet it admits those distinctions in society which are natural and necessary. The correct expression of our Bill of Rights is that men are born equal. It then rests with themselves to maintain their equality by their worth. The illustrious framers of our system, in all the sternness of republicanism, rejected all nobility but the nobility of talents, all majority but the majority of virtue.

Lastly, the government is one of our choice; not dictated to us by an imperious Chief Consul, like the governments of Holland and Switzerland; not taught us by the philosophers, nor

graciously brought to us on the bayonets of our magnanimous sister republic on the other side the ocean. It was framed by our fathers for themselves and for their children. Far the greater portion of mankind submit to usurped authority, and pay humble obedience to self-created law-givers ; not that obedience of the heart which a good citizen will yield to good laws, but the obedience which a harnessed horse pays his driver, an obedience begotten by correction and stripes.

The American Constitution is the purchase of American valor. It is the rich prize that rewards the toil of eight years of war and of blood : and what is all the pomp of military glory, what are victories, what are armies subdued, fleets captured, colors taken, unless they end in the establishment of wise laws and national happiness ? Our Revolution is not more renowned for the brilliancy of its scenes than for the benefit of its consequences. The Constitution is the great memorial of the deeds of our ancestors. On the pillars and on the arches of that dome their names are written and their achievements recorded. While that lasts, while a single page or a single article can be found, it will carry down the record to future ages. It will teach mankind that glory, empty, tinkling glory, was not the object for which Americans fought. Great Britain had carried the fame of her arms far and wide. She had humbled France and Spain ; she had reached her arm across the Eastern Continent, and given laws on the banks of the Ganges. A few scattered colonists did not rise up to contend with such a nation for mere renown. They had a nobler object, and in pursuit of that object they manifested a courage, constancy, and union, that deserve to be celebrated by poets and historians while language lasts.

The valor of America was not a transient, glimmering ray shot forth from the impulse of momentary resentment. Against unjust and arbitrary laws she rose with determined, unalterable spirit. Like the rising sun, clouds and mists hung around her, but her course, like his, brightened as she proceeded. Valor, however, displayed in combat, is a less remarkable trait in the character of our countrymen than the wisdom manifested when the combat was over. All countries and all ages produce warriors, but rare are the instances in which men sit down coolly at the close of their labors to enjoy the fruits of them. Having destroyed one despotism, nations gener-

ally create another; having rejected the dominion of one tyrant, they make another for themselves. England beheaded her Charles, but crowned her Cromwell. France guillotined her Louises, but obeys her Bonapartes. Thanks to God, neither foreign nor domestic usurpation flourishes on our soil!

Having thus, fellow-citizens, surveyed the principal features of our excellent Constitution and paid an inadequate tribute to the wisdom which produced it, let us consider seriously the means of its preservation. To perpetuate the government we must cherish the love of it. One chief pillar in the republican fabric is the spirit of patriotism. But patriotism hath, in these days, become a good deal questionable. It hath been so often counterfeited that even the genuine coin doth not pass without suspicion. If one proclaims himself a patriot, this uncharitable, misjudging world is pretty likely to set him down for a knave, and it is pretty likely to be right in this opinion. The rage for being patriots hath really so much of the ridiculous in it that it is difficult to treat it seriously. The preaching of politics hath become a trade, and there are many who leave all other trades to follow it. Benevolent, disinterested men! With Scriptural devotion they forsake houses and lands, father and mother, wife and children, and wander up and down the community to teach mankind that their rulers oppress them! About the time when it was fashionable in France to cut off men's heads, as we lop away superfluous sprouts from our apple-trees, the public attention was excited by a certain monkey, that had been taught to act the part of a patriot to great perfection. If you pointed at him, says the historian, and called him an aristocrat or a monarchist, he would fly at you with great rage and violence; but, if you would do him the justice to call him a good patriot, he manifested every mark of joy and satisfaction. But, though the whole French nation gazed at this animal as a miracle, he was, after all, no very strange sight. There are, in all countries, a great many monkeys who wish to be thought patriots, and a great many others who believe them such. But, because we are often deceived by appearances, let us not believe that the reality does not exist. If our faith is ever shaken, if the crowd of hypocritical demagogues lead us to doubt, we will remember Washington and be convinced; we will cast our eyes around us, on those who have toiled and fought and bled

for their country, and we will be persuaded that there is such a thing as real patriotism, and that it is one of the purest and noblest sentiments that can warm the heart of man.

To preserve the government we must also preserve a correct and energetic tone of morals. After all that can be said, the truth is that liberty consists more in the habits of the people than in anything else. When the public mind becomes vitiated and depraved, every attempt to preserve it is vain. Laws are then a nullity, and Constitutions waste paper. There are always men wicked enough to go any length in the pursuit of power, if they can find others wicked enough to support them. They regard not paper and parchment. Can you stop the progress of a usurper by opposing to him the laws of his country? then you may check the careering winds or stay the lightning with a song. No. Ambitious men must be restrained by the public morality: when they rise up to do evil, they must find themselves standing alone. Morality rests on religion. If you destroy the foundation, the superstructure must fall. In a world of error, of temptation, of seduction; in a world where crimes often triumph, and virtue is scourged with scorpions,—in such a world, certainly, the hope of an hereafter is necessary to cheer and to animate. Leave us, then, the consolations of religion. Leave to man, to frail and feeble man, the comfort of knowing, that, when he gratifies his immortal soul with deeds of justice, of kindness, and of mercy, he is rescuing his happiness from final dissolution and laying it up in Heaven.

Our duty as citizens is not a solitary one. It is connected with all the duties that belong to us as men. The civil, the social, the Christian virtues are requisite to render us worthy the continuation of that government which is the freest on earth. Yes, though the world should hear me, though I could fancy myself standing in the congregation of all nations, I would say: Americans, you are the most privileged people that the sun shines on. The salutary influences of your climate are inferior to the salutary influences of your laws. Your soil, rich to a proverb, is less rich than your Constitution. Your rivers, large as the oceans of the old world, are less copious than the streams of social happiness which flow around you. Your air is not purer than your civil liberty, and your hills, though high as heaven and deep as the foundations of the earth, are less

exalted and less firmly founded than that benign and everlasting religion which blesses you and shall bless your offspring. Amidst these profuse blessings of nature and of Providence, Beware! Standing in this place, sacred to truth, I dare not undertake to assure you that your liberties and your happiness may not be lost. Men are subject to men's misfortunes. If an angel should be winged from Heaven, on an errand of mercy to our country, the first accents that would glow on his lips would be, Beware! be cautious! you have everything to lose; you have nothing to gain. We live under the only government that ever existed which was framed by the unrestrained and deliberate consultations of the people. Miracles do not cluster. That which has happened but once in six thousand years cannot be expected to happen often. Such a government, once gone, might leave a void, to be filled, for ages, with revolution and tumult, riot and despotism. The history of the world is before us. It rises like an immense column, on which we may see inscribed the soundest maxims of political experience. These maxims should be treasured in our memories and written on our hearts. Man, in all countries, resembles man. Wherever you find him, you find human nature in him and human frailties about him. He is, therefore, a proper pupil for the school of experience. He should draw wisdom from the example of others, — encouragement from their success, caution from their misfortunes. Nations should diligently keep their eye on the nations that have gone before them. They should mark and avoid their errors, not travel on heedlessly in the path of danger and of death while the bones of their perished predecessors whiten around them. Our own times afford us lessons that admonish us both of our duty and our danger. We have seen mighty nations, miserable in their chains, more miserable when they attempted to shake them off. Tortured and distracted beneath the lash of servitude, we have seen them rise up in indignation to assert the rights of human nature; but, deceived by hypocrites, cajoled by demagogues, ruined by false patriots, overpowered by a resistless mixed multitude of knaves and fools, we have wept at the wretched end of all their labors. Tossed for ten years in the crazy dreams of revolutionary liberty, we have seen them at last awake, and, like the slave who slumbers on his oar and dreams of the happiness of his own blessed home, they awake to find

themselves still in bondage. Let it not be thought that we advert to other nations to triumph in their sufferings or mock at their calamities. Would to God the whole earth enjoyed pure and rational liberty, that every realm that the human eye surveys or the human foot treads, were free! Wherever men soberly and prudently engage in the pursuit of this object, our prayers in their behalf shall ascend unto the Heavens and unto the ear of Him who filleth them. Be they powerful or be they weak, in such a cause they deserve success. Yes, "The poorest being that crawls on earth, contending to save itself from injustice and oppression, is an object respectable in the eyes of God and man." Our purpose is only to draw lessons of prudence from the imprudence of others, to argue the necessity of virtue from the consequences of their vices.

Unhappy Europe! the judgment of God rests hard upon thee. Thy sufferings would deserve an angel's pity, if an angel's tears could wash away thy crimes! The Eastern Continent seems trembling on the brink of some great catastrophe. Convulsions shake and terrors alarm it. Ancient systems are falling; works reared by ages are crumbling into atoms. Let us humbly implore Heaven that the wide-spreading desolation may never reach the shores of our native land, but let us devoutly make up our minds to do our duty in events that may happen to us. Let us cherish genuine patriotism. In that, there is a sort of inspiration that gives strength and energy almost more than human. When the mind is attached to a great object, it grows to the magnitude of its undertaking. A true patriot, with his eye and his heart on the honor and happiness of his country, hath an elevation of soul that lifts him above the rank of ordinary men. To common occurrences he is indifferent. Personal considerations dwindle into nothing, in comparison with his high sense of public duty. In all the vicissitudes of fortune, he leans with pleasure on the protection of Providence and on the dignity and composure of his own mind. While his country enjoys peace, he rejoices and is thankful; and, if it be in the counsel of Heaven to send the storm and the tempest, his bosom proudly swells against the rage that assaults it. Above fear, above danger, he feels that *the last end which can happen to any man never comes too soon, if he falls in defence of the laws and liberties of his country.*

An Appeal to the Old Whigs of New Hampshire

FEBRUARY, 1805.¹

FELLOW CITIZENS: The period approaches, which will again make it our duty to give in our votes for candidates to fill the several offices in the administration of the State Government. In common times, no particular exertion is necessary to the discharge of this duty. When factions are asleep, when people are better employed through the winter than in concerting means to get themselves chosen in the spring, the ordinary and unsolicited attention of the community is sufficient to insure the election of honest and capable men. Public opinion, regulated by habits of virtue, and chastened by the salutary lessons of experience, is, on these occasions, equal to the exigencies of the case. But we are fallen on evil times. Our interest is not only endangered, but our reason also is waylaid. The same arts which cheat us of our political rights, beguile us of our understandings. These uncommon assaults must be resisted with uncommon firmness. Extraordinary dangers impose extraordinary

¹ From a pamphlet in the Amer. Antiquarian Soc., Worcester, Mass.

Mr. Webster referred to this pamphlet on two occasions. In 1806, writing to his classmate Bingham, he said: "Last year I wrote a political pamphlet in two days, which I have had the pleasure of seeing kicked about under many tables. But you are one of the few who know the author of the 'Appeal to the Old Whigs'! Keep the precious secret." And in his Autobiography, written in 1829, he gives the following account of the origin of the paper. "When I visited my father, from Boston, in January or February, 1804, a severe political contest was going on between Governor Gilman and Governor Langdon. The friends of the former, and they were my friends, wanted a pamphlet, and I was pressed to write one. I did the deed, I believe, at a single sitting of a winter's day and night. Not long ago I found a copy of this sage production. Among other things of a similar kind it is certainly not despicable. It is called an 'Appeal to Old Whigs.'"

duties. The house that shelters me in a mild season, may not be sufficient for my protection when all the winds of Heaven shall blow against it.

It is therefore, Fellow Citizens, that you are, in this manner earnestly requested to attend to the important duties which you are about to exercise. The old question is again presented to us, "Shall Mr. Gilman or Mr. Langdon be our Governor?" The very existence of this question proves that something is not right. Between men so opposite in principle, in sentiment, and in habit, there could never be a serious contest for the Chief Magistracy, if the public mind was free of every tincture of delusion and prejudice. A judicious choice between these candidates, involves more considerations than the compass of this Address can embrace. A few, and these the most obvious, shall be mentioned.

When we are heated with passion and party, no better admonition can be given to us, than to consider how we have before acted in similar circumstances, when these temptations to error have been absent. If, when swayed by no prejudice, seduced by no interest, and misled by no artifice, a man has formed a deliberate preference; will he, if he be honest, afterwards change his opinion, at a time when intemperate heats agitate, and temptations surround him? when his reason is beset with stratagems, and misguided by every trick that interested ambition and unblushing falsehood can invent? No. He will trust to the opinion which he had formed in more auspicious days. He will rely on the sentiments he embraced at a time when there was no reason why he should embrace error.

Let me inquire then, whether Mr. Gilman or Mr. Langdon has enjoyed most of the confidence of the People of this State, in times of quiet and harmony? No period in the history of the State has been more distinguished by these blessings, than from the death of Governor Bartlett to the year 1799. During the period which elapsed between these two eras, Mr. Gilman was annually elected Governor by a generality of suffrage altogether unprecedented, and approaching as near to perfect unanimity as can ever be expected in elections of this kind. In some years, he received five-sixths, in others, eight-tenths, and in one, ten-elevenths of all the votes throughout the State. Now if he

is the corrupt and dangerous man which he is represented to be, how came we to be ignorant enough, or wicked enough, to vote for him so regularly? There seems a mighty mystery in this. Is it possible, that our senses were so long drugged with an opiate? that our understandings were so long fettered with a charm? Where were then the vigilant patriots, now so ready to point him out to us as an aristocrat! a monarchist! a mere British instrument! Where was then the voice which has since been heard from Portsmouth to the uppermost springs of the Ammonoosuck, clamoring against him with such incessant rapidity as scarcely to leave time for echo to repeat the sounds? Or behind what cloud was that illustrious star obscured, which afterwards arose at Concord, shedding new light on the whole hemisphere of our politics? The desire of speaking intelligibly compels me to explain this mystery, by saying, that Judge Walker had not then learned to be ambitious; and that Mr. Langdon, contented with his seat in Congress, had no disposition to risk his reputation in a contest for the Governor's Chair! We were first taught, that Mr. Gilman was a dangerous man, when, in some unlucky moment, Judge Walker conceived the hope of being Governor, or when some friends conceived it for him; for that child of abortive birth seems also to have been the offspring of uncertain parentage. From that day to this, Mr. Gilman has been growing more corrupt, and, if Mr. Langdon be not gratified, will soon, no doubt, be the veriest Catiline alive!

Let us now glance back at the time when Mr. Langdon was Chief Magistrate of the State. Was that a day of unanimity and concord? No. Was he ever chosen by anything like a universal suffrage? No. Did public opinion attach so fondly on him as to elect him almost without a competition? No. The different fortunes of the two candidates explain the difference in their character. Mr. Gilman has been the most esteemed, when men are tranquil, dispassionate, and united. Mr. Langdon's fate seems ever to have been, to set the ocean of politics into a rage, and then to float himself on the surface.

In the year 1785, there was no choice of Governor by the people: the election of course devolved on the Legislature. As the constitution then stood, the House of Representatives were to elect two out of the four highest candidates; and of

these two, the Senate were to make a final choice. Mr. Langdon was one of the four highest candidates. It is believed he had fewer votes than either of the others: certain it is, he had much fewer than some of them. The Legislature were sitting in Portsmouth; and Mr. Langdon was elected by the House, and sent up to the Senate for their final decision, in company with Mr. Atkinson. The Senate were not behind the House in point of complaisance: although Mr. Atkinson had received the most votes from the people, they elected Mr. Langdon by seven votes out of twelve! Thus was it, that this man of the people became Chief Magistrate, without probably having received the suffrage of one freeman out of six in the State. For the four succeeding years, the State was rent into factions by the struggle between Mr. Langdon and General Sullivan. Three years out of the four, the claims of the Warrior prevailed; till at length both parties retired from the strife, the one on to the bench of the District Court, and the other into the Senate of the United States. Such was the career of President Langdon. Factions are his constant precursors. Whenever he appears in our horizon, he forebodes a storm. Storms and thick darkness alone can make his light visible.

But suppose we should discard all the opinions which we have heretofore formed, and resolve to bestow our votes according to the impression which the two candidates make at present on our minds. Is there a better assemblage of personal qualities in Mr. Langdon than in Mr. Gilman? Is the former more cool and dispassionate in reasoning, more upright in principle, more firm and inflexible in duty, than the latter? On the contrary, is not Mr. Langdon hot in the pursuit of power? burning with zeal? foaming with intolerance? Does he not hold in his hand a scourge of scorpions for the future chastisement of his opponents? We are indeed told, that Mr. Gilman is an Aristocrat! But what has he done that makes him such? He is, forsooth, a Monarchist! Where are the proofs? He is a British Hireling! What are his bribes? We inquire in vain. These assertions are made, to be circulated and believed — not to be proved.

But, Fellow Citizens, it cannot be concealed, that there is another consideration which is likely to have much more influ-

ence than any of those that are founded in the personal qualities of the candidates: and that is, the opinion which they hold respecting the present Administration of the General Government. We acknowledge then, with pleasure and with pride, that Governor Gilman is a Federalist of the Washington School, true to the principles and to the politics of his master. The National Constitution is his text—the Administration of Washington his commentary. If there be guilt in this, he is superlatively guilty.

The limits of this Address do not permit us, Fellow Citizens, to consider at full length the claims which the present Administration has on the confidence of the community; not to enter far into the question, whether an opposition to its leading measures is proof of political corruption in Governor Gilman. This Administration got into power by a successful hostility to the system of Washington, as adopted by himself, and followed by his immediate successor. It was foreseen, that that system could not be preserved, in the event of a change of power, because the man, who was aiming at the Presidency, had more than once expressed an aversion to it, in all its principal parts. The Party, at the head of which this Man then stood, and still continues to stand, has long existed among us under different names. The same men who now denominate themselves Republicans, were violently opposed to the adoption of the Constitution, and were then called Anti-Federalists. During the Administration of Washington, a minority in Congress, who uniformly arrayed themselves in hostility to every important measure which the President proposed, was made up entirely of these men. When the French Revolution commenced, they attached themselves warmly to the interest of France, and then took the name of Jacobins. They opposed the President's proclamation of neutrality: they countenanced the schemes of Genet: they encouraged the Western Insurrection. When the crimes of French Revolutionists struck everybody in this country with horror, they put off the appellation of Jacobins, and called themselves Democrats. It was the same Party that quarrelled with Washington about the Treaty-making power—the same Party that supported the Aurora, the Watch-Tower, the Chronicle, and the other papers in

the country which have been in the habit of abusing Washington, and denouncing Federalists. Of this distinguished Society, many of the original members, and among others Mr. Jefferson and Mr. Gerry, are now living, and under the name of Republicans, soliciting the confidence of the people. This junto, whose first cement was Anti-Federalism, gathered strength and numbers as it proceeded. Monroe, Gallatin, Giles, Nicholas, Armstrong, and the Livingstons, were early initiated. Gen. Dearborn and Mr. Langdon, now such unadulterated Republicans, grew up politicians and patriots under the auspicious circumstance of inveterate hostility to the first President! Opposition to the adoption of the Federal Constitution, opposition to Washington and Adams, opposition to every important measure of the Federal Administration, has invariably been made by one and the same Party, under different names. Shew me the man who persevered in hostility to the Federal Constitution, and I will shew you a friend of Mr. Jefferson and his Administration. Or shew me the personal enemy of Washington, and I will shew you a man who now calls himself a Republican.

After an Inaugural Speech abounding in promises, and a Message overflowing with economy, Mr. Jefferson began his career by recommending the repeal of the Judiciary Law. Federalists looked on, while this act of desperate vengeance was executed, with awful presentiments of the consequences. They foresaw that this repeal, while it annihilated one of the most esteemed provisions of the Constitution, would leave alive a spirit that would triumph over the remnant. Recent events have attested the truth of the prophecy. This spirit hath gone forth, in indignation and terror, stalking over every compact with which the Constitution and the Laws had guarded the seats of Justice. Judicial Independence is now a mockery. The man who mentions it seriously, is ridiculed. Will any one read the observations lately made by Mr. Giles in the Senate, and then say, that the Constitution which he contends for, leaves Independence to the Courts of Law? The slaves of that gentleman could have told him, that human beings, trammelled with so many restrictions as he would impose on the Judges, are not free! If any one, at this day, doubts whether it be

an object with the Democrats to humble the Judiciary in the dust before their feet, let him consider maturely the treatment of Judge Chase. Contemplate that venerable Magistrate, pressed beneath the weight of seventy years, arraigned before the Senate. Is he treated with the civility due to a Gentleman? with the reverence due to a Magistrate? with the respect due to years? Is he not rather the object of indignity and rudeness, beyond the scenes of the Old Bailey? Nor does the justice of his Judges exceed their decency. While his accusers have had months and years to hunt up charges against him, he is allowed but a few short days to prepare his defence. And what are his flagitious crimes? Are his gray hairs polluted with treason? Has he been secretary to any association of Insurgents? Has he untied his purse-strings to reward the calumniator of Virtue and Excellence? Has he fled to the mountains in the hour of his Country's danger? Or is his right arm red to the shoulder in Hamilton's blood! Fellow Citizens, he is impeached for no such cause; But, he is impeached, because he manifested, as his enemies say, a "solicitude" to bring a ruffian to punishment—a "solicitude" to chastise him whose mouth had uttered calumnies, black and false as hell ever forged, against Washington, against Adams, and against Washington's and Adams's friends. Unfortunate Judge! He mistook the temper of the times. He imagined he was living in the days of a virtuous Republic, when the Laws are more powerful than the offender. He mistook, too, the culprit before him. Callender was not a wretch abandoned by all human beings on account of his profligacy and his vices. Profligate and vicious as he was, he was the associate of a great and ambitious faction. He was succoured by an arm which in the end proved stronger than the Justice of the Country—an arm that now holds the Sceptre of the Nation!

The next important measure of the Administration, after repealing the Judiciary Law, was the abolition of the Internal Taxes, a system of revenue devised by the Federalists, for the benefit of the poorer classes of the people. Yet this abolition has been much applauded as a Republican measure! I have read of the Republicanism of Switzerland, cheering the peasant at his plough, and giving him an equality with Princes. I have

read, too, of the Republicanism of ancient Greece and Rome, where the principal expenses of the State were levied exclusively on the rich and luxurious. These illustrious examples I have thought worthy the imitation of my own country. But I have read of the Despotism of Turkey, of the Aristocracies of Poland, of the Dominion of the Bourbons and the Bonapartes in France; and have there marked, that the toil and sweat of poverty are severely taxed to support the folly and extravagance of the great. But things change their names. Measures of this kind are now complimented with the appellation of *Republican*!

The accomplishment of the Virginia amendment to the Constitution, and the rejection of that proposed by Massachusetts, open a field of discussion too wide for the present occasion. It has been repeatedly shewn, that the adoption of the first, and the rejection of the last, operate to the same end—the aggrandisement of the great States, at the expense of the small; the decrease of “New England Influence,” and the securing to Virginia of the perpetual right of the Presidency.

A pretended regard to Economy induced Mr. Jefferson to sell the Navy at an immense sacrifice. The Navy was dangerous to the State! It would enslave the people! A Ship, a Ship was the accursed vehicle, which was to bring an European Prince to reign over us! The pride of the Navy was therefore knocked down under the hammer of the auctioneer: or suffered to rot, dismantled, in the mud. The war with the Mediterranean Powers languishes for want of sufficient force. While the President amuses himself with building Gunboats, the American seamen, brave and gallant as ever the sea bore up, are impeded in every operation, weakened in every blow on the enemy, by the want of ships. Economy has given up a whole crew of our Citizens to the repose of cells and dungeons; and plunged others, the most promising Youths of our Land, beneath the waves of the ocean.

These, Fellow Citizens, are a few of the measures of the Administration. They are a small part of the fruits of four years of Democracy. But our past experience augurs less evil than our future prospects. There is no tendency in the unrestrained violence of Jacobinism to renovate itself. It has an

obliquity in its nature, which carries it every day farther from truth and justice. Suffer me then, Fellow Citizens, to remind you of

OUR DANGERS.

A prime source of apprehension is the influence of the example of Government on our habits and morals. It is an inconsistency which prosperity will never be able to explain, that a people, professing Christianity, should elect for their Chief Magistrate a man who scoffs at their Religion; who thinks it a matter of uncertainty, at least of indifference, whether there are twenty Gods or one; and who supposes a decayed and tottering Temple to be good enough for a Saviour that was born in a manger! The influence of these sentiments, enforced by the character of a Chief Magistrate, is incalculable.

Another evil to be dreaded, is the total loss of the Constitution. To destroy this instrument entirely, is not the work of so much time as some imagine. Give to the House of Representatives new and extraordinary powers of Impeachment, as Mr. Randolph * wishes — annihilate the Senate, as Mr. Eppes † wishes — make the Courts of Law answerable to the Legislature for the opinions which they give, as Mr. Giles ‡ wishes — secure the perpetual Presidency to Virginia, as Mr. Jefferson wishes; and what have we then left of the Federal Constitution? Nothing — nothing — except the solitary article, so full of consolation to New England, which provides for the Congressional Representation of three-fifths of the Southern Slaves! The Constitution, thus mutilated, cannot protect us. It will be spoiled of all its original strength and energy. Instead of being a shield to cover the defenceless, it will become a scimitar, with which dominant factions will hew down their adversaries. Some adventurer, bolder than the rest, will finally trample it under his feet, or scatter its loose leaves in the wild winds! We are fast learning Revolutionary lessons. The Masters who now instruct us, only require time to make us fit for the discipline of the Guillotine. Young in years, we are fast pushing to a respectable standing in the ranks of

* Member from Virginia.

† Member from Virginia, and the President's son-in-law.

‡ Senator from Virginia.

political Folly ; and the retributions of a just Providence must, one day, chastise us with sore calamity, for the abuse and perversion of National privileges.

If such, then, Fellow Citizens, be our Dangers, let us attend to

OUR DUTIES.

Do we know Mr. Gilman ? Have we proved him and found him corrupt ? Have we known him to stand up, in an assembly of citizens at Portsmouth, and toast Tom Paine ?* Did he vote, in the State Legislature, against having his own carriage taxed ?† Have we suffered the evils of a bad Administration, while the Government was in the hands of the Federalists ? Do we prefer the enemy of Washington, to his friend ? the man who establishes Printing-Offices to promote his own election, to him who holds on the noiseless tenor of his way, unaffected by the calumny that would blacken, or the ambition that would supplant him ? Do we prefer such a Government as the mercy of Jacobinism may hereafter bestow on us, to the National Constitution ? Has the name of Freedom more charms with us than the reality ? Is peace less desirable than the sword ? We will go, then, if these are our preferences, and with religious scrupulousness, give our votes for the Democratic Ticket. We will go to the poll, and there renounce our regard for the Constitution — renounce the character of Freemen — renounce our veneration for Washington — renounce our interest — renounce our duty — and renounce our Faith !

But if we should choose to support the opposite Ticket, let us do it with zeal and with spirit. While our adversaries are making auxiliaries of all the fiery and head-strong passions, shall not Federalists enlist an honest enthusiasm in their cause ? Shall there be nothing cold in the Country but real patriotism ? nothing unanimated but duty ? A united, vigorous, persevering effort, may do much. If it cannot prevent the final catastrophe, it may, at least, delay it — delay it, a few years, till the remnant of the Fathers, who achieved our Revolution, shall be carried to peaceful graves, and their presence no longer reproach the apostacy of their sons !

AN OLD WHIG.

* As Mr. Langdon did.

† As Mr. Langdon did.

Original Criticism. First Canto of Terrible Tractoration

MONTHLY ANTHOLOGY, April, 1805.¹

A CONCERN for the literary reputation of our country is one of the least suspicious forms in which true patriotism displays itself. Whoever feels this concern will not take up a poetical volume, the production of his fellow citizen, but with liveliest emotions. Our country has its character to form. We are yet in our literary infancy, just "lispering in numbers," just pressing, with faint and faltering voice, our new and doubtful claim to literature and science. Terrible Tractoration has therefore been read with peculiar interest, and the general sentiment will warrant us in saying, with equal satisfaction.

In commending Christopher Caustic we are only subscribing to the opinions expressed by the people of another country. To be behind that country in our appreciation of his merits were a stigma; it is very pardonable to go beyond it. National vanity may be a folly; but national ingratitude is a crime. Terrible Tractoration was successful in England on its first appearance, and as yet seems to have lost none of its popularity. It belongs to that class of productions which have the good fortune to escape what Johnson angrily, but too

¹ Mr. Webster wrote five articles for *The Monthly Anthology*. "Terrible Tractoration" was the first, and his initials were printed at the end of the Essay. The Boston Public Library has in its possession George Ticknor's set of the magazine and Mr. Webster's name appears at the end of each article in the handwriting of Mr. Ticknor, who undoubtedly knew by whom these and other articles were written and added the names for his own reference. In his *Autobiography*, mentioning the *Anthology* papers, Mr. Webster says: "The two years and a half which I spent in Boscawen were devoted to business and to study. I had enough of the first to live on, and to afford opportunity for practice and discipline. I read law and history; not without some mixture of other things. These were the days of the *Boston Anthology*, and I had the honor of being a contributor to that publication."

justly, denominates "the general conspiracy of human nature against contemporary merit." It has already been reprinted a second time; the impression which is read in Boston being a revised and corrected copy of the second London edition. The occasion of the work seems to have been accidental, and its design, originally, nothing more than to ridicule the overglowing zeal with which certain English physicians persecuted the reputation of Perkins' metallic tractors. But the work grew beneath the author's hand. He found that quackery was not confined to medicine. He traced it with his eye, and followed it with his scourge, into the regions of philosophy, natural history, politics, morality, and poetry; till, in the end, a scanty newspaper essay grew to be a volume of satire on various subjects. In the prosecution of his views, the author has confined himself to legitimate means. While pursuing humorous associations, he never grows intemperate, immoral, or indecorous. On this point he is entitled to every commendation. His wit is neither embittered with the malice of Pindar, nor corrupted with the sensuality of Moore.* The first canto, and that to which all particular remarks in this paper are confined, is entitled *Ourself!*—and is, what it should be, a neat and compact description of the design of the canto. As a fair specimen of the author's manner, we transcribe the eight first lines, which are neither the best nor the worst to be found in it.

From garret high, with cobwebs hung,
The poorest wight that ever sung,
Most gentle Sirs, I come before ye,
To tell my lamentable story.
What makes my sorry case the sadder,
I once stood high on Fortune's ladder;
From whence contrive the fickle jilt did,
That your petitioner should be tilted.

* The writer foresees that he shall be charged with puritanism for objecting to the delicious verses of the translator of Anacreon. Be it so. In his opinion, the author who cannot please without endangering the morals of his readers, had better study ethics than write poetry. On the restraints which youth, with infinite pains, imposes on its passions, Mr. M. breathes the effusions of licentious ingenuity, and they dissolve like scorched flax. The association of impure, unhallowed sentiments, with the enchanting power of genius and poetry, is one of the most fatal possible combinations against human happiness.

In despite of the Muses, who, as he chooses to say, refuse to inspire him, he makes himself poetical by inhaling a quantity of Dr. Beddoes' gaseous oxyd of nitrogen. This fancy gives him an opportunity of exercising much raillery on that boasted catholicon. Grown giddy himself by this inhalation, he chooses to consider the poetical giddiness of Southey as produced by the same cause; thence exculpating Apollo from having any share in the inspiration of that poet.

In the following stanza the author contrives to compliment himself, by a pretty successful play upon words; a species of wit at which an unfortunate attempt creates great disgust.

How these confounded gasses serve us!
But Beddoes says that I am nervous,
And that this oxyd gas of nitre
Is bad for such a *nervous* writer!

Dr. Anderson, in the "Recreations in Agriculture and Natural History," had said with great gravity, "that the mathematician can demonstrate with the most decisive certainty that no fly can alight on this globe which we inhabit without communicating motion to it." This important discovery, and others of the same learned Doctor, are very properly ridiculed.

— Could tell how far a careless fly
Might chance to turn this globe awry,
If flitting round, in giddy circuit,
With leg or wing, he kick or jerk it.

The follies which disgrace the affected lovers of natural history receive no small share of Caustic's derision. It is indeed time, high time, that they were hooted from society, loaded with the reprobation and contempt of every man of sense. Among the crowds of men there is no one more despicable than he who thinks it an object to rear a race of rabbits with one ear; unless it be another who laments the extinction of a breed of dogs with three legs.

The whimsies of St. Pierre, the deistical and atheistical speculations of Darwin, that heresiarch in poetry and philosophy, and the fooleries of William Godwin, are assaulted in the canto with much spirit and success. There are two schools in religion and literature, as well as in politics. It is gratifying to the disciples of the old, that the author of Tractation

displays wit and sense and poetry on its side, against the pride and the folly, the ridicule and the ribaldry, the pitiable ignorance and the hateful malignity of philosophists, deists, atheists, and reformers. He believes that the harvest of infidelity and French philosophism is sorrow and delusion; that they who sow the wind shall thereof reap the whirlwind.

The versification of the first canto is uncommonly harmonious. It might be difficult to select, from the same compass of Hudibrastic poetry, more unexceptionable lines. To some of the rhymes, however, astute criticism might object. Description is made to rhyme with subscription; problematic with systematic; elated with inoculated. In these cases the last two syllables of the words, and those which form the rhyme, are not only similar in sound, but precisely the same. Such rhymes may have precedents in books of authority, and in long works it may be difficult to avoid them; but to the ear of the writer of this article they give no delight; and, as no poetry can be neutral, they of course displease. Johnson objects to one of the epitaphs of Pope, that light is made to rhyme with night.

Nor can I say that I receive pleasure from rhymes when the corresponding sounds are farther from the end of the line than the penult syllable. Therefore, when electricity chimes with duplicity, propriety with society, utility with perfectibility, the pleasure arising from similarity of sounds is destroyed. In heroics the rule imperiously fixes the rhyme to the last syllable. In Hudibrastics a poet's license will permit him to vibrate between the final and the penult. This, it may be said, is catching at small or doubtful errors. Be it so. But unless we can give form and substance to these, we shall cease to be the author's critic, and become his eulogist.

If Terrible Tractation be considered a satire, it is formed rather after the example of Horace, than of Juvenal and Pope. There are exceptions, but as a general rule it may be said to be rather a laugh at the follies than a censorious reproof of the vices of mankind. To the first canto this observation applies strictly. All is gay, pleasant, and playful. There is no angry satire in the poetry, no indignant declamation in the notes.

In point of scholarship the author appears not to be deficient. In the phraseology of Burnet, he has "laid out his learning with as much success as he laid it in."

On opening the book one is reminded of the elegant alliterative metaphor of Sheridan, "a neat rivulet of text meandering through a meadow of margin." This is certainly matter of questionable propriety, but it is the taste of the times. Modern poets determine to be their own commentators, and to leave nothing to the labors of a future Eustathius, Johnson, or Wharton. It is more easy to account for this practice, than to justify it. Modern poems are occasional performances, deriving their incidents from particular occurrences, and full of allusions to particular characters. The knowledge of such incidents and characters necessarily confined to a small circle, must be generally circulated before the poem can be read with general pleasure.

The notes, which constitute the bulk of the volume, partake of the spirit of the poetry. In general they are sprightly, appropriate, and occasionally abounding with poignant irony. It is possible they contain some levities of expression, not unexceptionable, even in this sort of composition. To call the moon "miss Luna," or the prophetess "miss Sybil," requires no part of the wit of Christopher Caustic. Such sophomorical associations are made by anybody. To speak, too, of a "comet's taking it into its head," is frivolous, if not flat; and so, I imagine, is the imitation of a drunken man, by splitting the words he is made to use. Homer sometimes dozes. On the whole, *Terrible Tractation* is a work which does honor to its author, and goes far towards refuting the slanders on American genius.

D. W.

Address at Concord, N. H.

JULY 4, 1806.¹

THIS country exhibits an interesting spectacle. She is the last of the little family of republics. She hath survived all her friends, and now exists, in the midst of an envious world, without the society of one nation with which she is associated by similarity of government and character. Whether it be possible to preserve this republican unit in existence and health, is the great question which perpetually fastens on the mind. This inquiry is paramount to all others. Whether this or that political party shall rise or fall; whether this or that administration possess most talents and experience; whether the sentiments of one or another chief magistrate are most favorable to the progress of the nation's population and wealth. These questions, important in many respects, are important to the last degree, so far, and so far only, as they affect the integrity of the Constitution.

To this point every good man's heart and hands are turned. It is the object of his most ardent wishes, and his most active exertions. I cannot on this occasion seduce my own attention, nor would I wish to divert yours from the consideration of this great subject. Is our existing constitution worth preserving? Is it, as hath been said, the last hope of desponding human nature? Is it the brazen serpent to which we turn our eyes, when worried by the fiery serpents of false patriotism and false politics? Guard it then, as you would guard the seat of life, guard it not only against the blows of open violence, but also against that spirit of change, which, like a deadly mortification, begins at the extremities, and with swift and fatal progress approaches to the heart. Do you deem it imperishable? Can

¹ "An Anniversary Address delivered before the Federal Gentlemen of Concord and its Vicinity, July 4th, 1806. From the Press of George Hough, Concord, N. H."

no crime destroy, no folly forfeit it? Is it the Rock of Gibraltar, against which the waves of faction may beat for ages, without moving it from its bed? Beware! I dare not assert *that*, in this place, sacred as it is to truth, and unaccustomed to all language but that of conviction. Men are subject to men's misfortunes.

If an angel should be winged from heaven on an errand of mercy to our country, the first accents which would glow on celestial lips would be, "Beware! Be cautious! Be wise! You have everything to lose; you have nothing to gain!" We live under the only government that ever existed, which was formed by the deliberate consultations of the people. Miracles do not cluster. That which has happened but once in six thousand years, cannot be expected to happen often. Such a government, once destroyed, would leave a void to be filled, perhaps for centuries, with evolution and tumult, riot and despotism.

When we speak of preserving the Constitution, we mean not the paper on which it is written, but the spirit which dwells in it. Government may lose all its real character, its genius, its temper, without losing its appearance. Republicanism, unless you guard it, will creep out of its case of parchment like a snake out of its skin. You may have a despotism under the name of a republic. You may look on a government, and see it possess all the external modes of freedom, and yet find nothing of the essence, the vitality of freedom in it; just as you may contemplate an embalmed body, where art hath preserved proportion and form, amidst nerves without motion, and veins void of blood. There are two classes of causes which may affect the safety of our present excellent system of government. The most numerous, and the most dangerous, comprise those which arise among ourselves, from our own passions, and our own vices. But these are not all. Others arise from our foreign relations. It is with nations as with individuals, their society has great influence in determining their character. Foreign relations, if pursued into the ten thousand windings and intricacies of commerce, is an endless subject. Let us consider them no farther than they may be supposed to affect the preservation of essential national rights, and the security and

permanence of the Constitution. Their objects are intimately connected.

The preservation of important rights is essential to the existence of a free Constitution. As government is instituted for the defence and protection of the citizens, they will reluctantly support it, when they are taught that it is incompetent to effect these ends. The surrender of just claims, under pretence that the Constitution has not energy enough to defend them with dignity, is calumniating it in the presence of those whose attachment is so necessary to its existence. A republican system hath no basis but the people's choice. You weaken it, therefore, when you weaken the love of it. When you render it contemptible, you finish it. It is not a labored inference drawn from premises, it is a plain first principle, that a government which cannot protect the rights of the nation cannot protect itself. Under these views, it is, that the foreign relations of the country assume such an interesting aspect.

Our ancestors, the first settlers of these states, imbibed the idea that distance and the sea had forever separated the Western from much connection with the Eastern Continent. They had no apprehension (and who then could have ?) of that rapid rise to commerce and consequence which hath since made this country an important object of consideration to the politicians of Europe, and placed us in the neighborhood of the great states of the earth. America is not now a small, remote star, glimmering on the political concerns of Europe with a faint and cold beam. She is in the new firmament, shining with a brilliance which cannot be hidden, and occupying a portion of the hemisphere which cannot be disregarded. Commerce is the great magician which thus annihilates distances and unites countries which Providence seems to have separated.

The only nations on the Eastern continent which are now in a situation that enables them to annoy this country to any considerable degree, are Great Britain and France. These are the two great levers which move the world. They are the two champions contending in a last effort for victory ; and the smaller nations around them, unsafe to act an independent part " within the wind of such commotion," either retire from the scene or seek shelter under the power of one of the com-

batants. In the progress and termination of this conflict, we have, perhaps, more interest than some, and less than others, if our passions would tempt us to believe.

Every nation, as well as every man, hath its ruling passion. It hath some darling object which it pursues in preference to all others. Here is the tender side. Touch this, and you touch a nerve which vibrates directly to the heart.

In Great Britain this ruling passion is commerce. This is the apple of her eye. Her situation indicates this employment for the support of her immense population, and habit hath completely moulded the genius of her people to the exigencies of their situation. She is powerful beyond rivalship in her navy, assiduous beyond belief in circulating her trade through every vein and artery of the commercial system. These national pursuits determine the national character. On the subject of naval rights she is jealous, haughty, and arrogant. Touch but the hair of her head and she quarrels with you. As in other cases, the power to do wrong too frequently gives the disposition. While she guards her own immunities with ceaseless vigilance, she is inclined to make such gradual encroachments on the rights of others as threaten, if unresisted, to vest all rights in herself.

What course is it policy to hold with such a nation? Is it wise to resist aggressions? to redress injuries? to resent insult? to assert and maintain national character and national rights? or is it wise to trim and accommodate, to bend to time and circumstance with the best grace we can? to turn the unsmitten cheek, and surrender important rights to the disposal of others?

These sentiments of the heart decide these questions without any appeal to the understanding, and the understanding, unsolicited, confirms the decision of the heart. Whether we consult character or expediency, spirit or policy, the answer is the same, *Defend yourselves!* If we submit to first aggressions, how far is forbearance to extend, and at what point is resistance to begin? Shall we be servile today, and fix on tomorrow or the next day as the proper time for honorable resentment? Do we shake poppies on all our senses now, with an expectation of waking from our stupor hereafter

with more acute sensibilities? A high wrought affectation of resentment, a petulant propensity to go at fisticuffs for every trifle, are the definitions of false honor. A firm adherence to rights, which leads to a cool, though unconquerable, determination to defend them at every hazard, is true dignity. Without this, we cannot long have peace, nor good government. A philosophical endurance of repeated injuries, is the greatest of all maladies that can befall a government. It is even worse than occasional precipitation.

Fever is not so dreadful as consumption. Depletion and regimen may cure the former, but when the latter appears, it writes death upon the countenance. Nations generally hold the same grade in the estimation of others which they hold in their own. While they do not respect themselves, it is in vain that they solicit respect from rivals.

Nothing seems plainer than this: if we will have commerce we must protect it. So long as we are rich and defenceless, rapacity will prey upon us. The government ought either to defend the merchant, or to repeal the laws which restrain him from defending himself. It ought to afford him the assistance of armed vessels, or to suffer him to arm his own vessel. It ought not to bind him hand and foot, and surrender him to the mercy of his enemy.

On this subject of the protection of commerce much has been said, and many opinions entertained. There is a system which is opposed to every degree of naval preparation. There are men who would not defend commerce an inch beyond the land. They choose to consider the United States as exclusively agricultural, as a great land animal, whose walks are confined to his native forests, and who has nothing to do with the ocean, but to drink at its shores, or sooth its slumbers by the noise of its waves.* This system may have some bright parts, but, as a whole, it is impracticable and absurd. Like the sun in eclipse, a few rays of brilliant lustre may decorate its outer edges, but the great body of light is intercepted.

This country is commercial as well as agricultural. Indissoluble bonds connect him who ploughs the land with him who ploughs the ocean. Nature hath placed us in a situa-

* Mr. Randolph.

tion favorable to commercial pursuits, and no government can alter the destination. Habits confirmed by two centuries are not to be changed. An immense portion of our property is on the waves. Sixty or eighty thousand of our most useful citizens are there, and are entitled to such protection from the government as their case requires.

Is it said, We ought never to have differences with other nations which may render measures of protection necessary? This is as wise as to say that blasts and mildews ought never to visit our fields. They come upon us inevitably, and we have nothing to do, but to consider how we may act with most dignity and effect. Or is it said, We will have no navy, because we cannot have one large enough to subdue the British fleet? Will we then leave our ports and harbors defenceless, because we cannot make conquests in the British channel, or set London on fire with bomb shells? Shall we shrink from the defence of our house, because we are not strong enough to pull down the house of our neighbor? That sentiment be to him who hath shoulders broad enough to bear the disgrace of it. It is the offspring of false economy or inordinate avarice. It never sprang from the altar of "seventy-six."

The recent murder of John Peirce, by a British captain in the harbor of New York, is an event well calculated to try the spirit of the times. It is a thermometer by which may be determined the temperature both of the government and the people. In 1770, when the United States were colonies of the British king, before they had called themselves a nation or dreamed of independence, some British soldiers in Boston, provoked by menaces and pelted with brickbats, fired among our citizens, killed some and wounded others. The act roused America! The continent rose to arms! The cry of blood was abroad in the land, and from that moment we may date the severance of the British Empire. In 1806, when the fruits of independence are ripened by the lapse of thirty years, during which time national honor hath received neither spot nor blemish, a British captain, unprovoked, without cause, without pretext, without apology, in our own harbor, in the sight of our citizens, wantonly and inhumanly fires on an

American vessel and murders one of her crew. The community is petrified with astonishment, as well as heated with indignation. There is but one voice on the occasion, and that exclaims with imperious emphasis, *Punish the wretch who thus violates the laws of hospitality, defies your government, and sports with the lives of your citizens.* This act, if it had been committed in the Seine or the Thames, without instant reparation, had been the cause of a national war. But in America things are understood better; it was only the cause of a proclamation. Illustrious remedy for wounded honor! That instrument, so efficacious for national defence, ought to be written in telegraph, and displayed above the tops of our lighthouses, that it might be seen and read half-way across the Atlantic, and remain a perpetual safeguard to our shores.

Patriotism hath given place to the more laudable spirit of economy. Regard to national honor, that remnant of chivalry and offspring of the dark ages, is absorbed in a thirst for gain, and desire of saving, the liberal sentiments of enlightened times.

As a land power, Great Britain can never be formidable to this country. Her navy is her weapon, and in the use of that she will continue to harass us, until she finds us able and disposed to resist her. A naval force sufficient to protect our harbors and convoy the great branches of our trade, is the natural, necessary, and unavoidable measure of defence. To this the government, first or last, must resort, or they must submit to every species of maritime plunder, and shut their eyes and ears against insult and disgrace. That which ought to have been done originally from regard to character, must be done in the end from the pressure of necessity. National honor is the true gnomon to national interest.

When we turn from Great Britain to France, we are led to contemplate a nation of very different situation, power, and character. We seem to be carried back to the Roman age. The days of Cæsar are come again. Even a greater than Cæsar is here. The throne of the Bourbons is filled by a new character of the most astonishing fortunes. A new Dynasty hath taken place in Europe. A new era hath commenced. An Empire is founded, more populous, more energetic, more war-

like, more powerful than ancient Rome at any moment of her existence. The base of this mighty fabric covers France, Holland, Spain, Prussia, Italy, and Germany ; embracing, perhaps, an eighth part of the population of the globe.

Though this Empire is commercial in some degree, and in some of its parts, its ruling passion is not commerce, but war. Its genius is conquest, its ambition is fame. With all the immorality, the licentiousness, the prodigality and corruption of declining Rome, it has the enterprise, the courage, the ferocity of Rome in the days of the Consuls. While the French Revolution was acting, it was difficult to speak of France without exciting the rancor of political party. The cause in which her leaders professed to be engaged, was too dear to American hearts to suffer their motives to be questioned, or their excesses censured with just severity. But the Revolutionary drama is now closed, the curtain hath fallen on those tremendous scenes, which for fourteen years held the eyes of the universe, that meteor, which "from its fiery hair shook pestilence and war," hath now passed off into the distant regions of space, and left us to speculate coolly on the causes of its wonderful appearance.

To other nations, however, France stands in the same situation as before. The consequences which flow to them from her neighborhood, are neither increased or diminished, nor in any way altered by the change in her government. It is the French character alone which is the object of regard. This depends no more on the form of the government, than the strength of Hercules on the fashion of his coat.

There is a spirit of nationality in the French which attaches in equal degree to no other people. Their leading feature is a wonderful promptitude in devoting themselves to their existing government, whatever it may be. No personal pique or dissatisfaction cools a French citizen in the service of his nation. French generals will fight, French ministers will intrigue, notwithstanding the government of their country may not be in hands that suit them. France is their sole object ; its glory their sole ambition. It is, therefore, that in all the changes that have happened at Paris, the foreign agents have taken no part ; they pursue their object with zeal at all times equally

ardent, and assiduity at all times equally unremitted. Though the form of government should change as often as the moon; though new systems should spring weekly from the brains of philosophers; vaporous and evanescent as the mists of the ocean; yet it would require centuries to change these traits of national character which centuries have wrought. To eradicate the emulation, to quench the zeal, to subdue the Jesuitism, and purify the literature of the nation, is the work of ages. It is these permanent causes, not the temporary form of government, that shed such an aspect of terror on the nations of the earth. Ambition is the never-dying worm which feeds and fattens in the bosom of the Gaul. To an eagerness for personal distinction is also added a thirst for national glory, unheard of since the days of Rome, and unequalled, perhaps, even by the Romans.

The intellectual world is considered a theatre of contests, not less than the natural. The morals and sentiments of the nations which have been added to the French Empire have been as completely subdued as their physical strength. The fire and sword of philosophy have a duty of desolation assigned them, as well as the fire and sword of the army. We repeat, therefore, that these causes exist exclusively in the national character, in the religion and literature of the country, and have no connection with the form of the government. They would have been as powerful, if Louis had occupied his throne till this time, as they now are. They are as powerful now as at any moment of the Revolution.

It is not to be inferred from these remarks, that France is less our friend, or more our enemy, than Great Britain. The friendship of nations is no broader than their interest. Each pursues its own object, in different channels, and under different shapes, but with equal disregard to the interest of others.

How much farther the power of France may be extended, what new channels it may hereafter scoop to itself, is impossible to determine. No friend, however, of the human race, can wish to see it extended farther. It is infatuation to desire one nation to be made absolutely supreme over all others. Yet there are men who would rejoice to see the Island of Great Britain a colony of France, a patrimony to some one of the

Bonapartes or Beauharnois ; there are men who would exult if the "iron sceptre of the ocean should pass into his hands who wears the iron crown of the land." * Heaven protect this country and the civilized world against such an event ! Britain is entitled to no merit for fighting for her own existence ; she is contending, not for us, but for herself. Standing, however, as she doth, the sole obstacle to universal power in Europe, it is the part of unutterable folly to desire her fall.

Such, fellow-citizens, are the principal nations with which fortune hath connected us, in the intercourse of the world. Against the power of either, there is nerve and muscle enough in this country to defend our government, if wisdom enlighten our councils, and union give energy to our exertions. States seldom fall till they have deserved their fate. The history of the world hath furnished few instances, and the last hundred years afford none, of any nation falling beneath the crush of superior power, united, courageous, and patriotic. Armies will be easily repulsed if you have in the first place checked the "torrent floods" of disunion and faction. You will withstand the shock of military hosts, if you have successfully withstood the onset of corrupt opinions, which, like the locusts of Egypt, "come soaring on the Eastern wind."

These first duties depend on our virtue and our patriotism. Without these, it is vain to talk of a good government ; and with them, it is not easy to have a bad one. A correct and energetic tone of public morals is the prop on which free constitutions rest. After all that can be said, the truth is, that liberty consists more in the morals and habits of the people, than in anything else. When the public mind becomes thoroughly vitiated and depraved, every attempt to preserve public liberty must be vain. Laws are then a nullity, and constitutions waste paper. Can you check the wind with a song, or stay the ocean with a bulrush ? Then you may think of opposing constitutions and charters to the progress of an ambitious usurper, encouraged in his views, and supported in his measures, by a corrupt and profligate community. The Cæsars and Catilines have their only check in the public morality. When they rise up to do evil, they must

* Mr. Randolph.

find themselves standing alone. Experience hath certified the truth, till inspiration could not make it clearer, that foreign power, or domestic violence, will assuredly totter down that edifice of freedom which is not founded on public virtue.

But virtue hath its essence in religious sentiment. Without that, virtue is a realm of frost. Its influence is colder than the northern star. The temple and the altar are the best pledges of national happiness, and he that worships there is the best citizen. It is well to cherish the expectation of future being. Would you have good citizens? Leave to men, then, the consolations of religious hope. The altar of our freedom should be placed near the altar of our religion. Thus shall the same Almighty Power who protects his own worship, protect also our liberties.

Finally, let us cherish true patriotism. Let not the currency of the counterfeit tempt us to disbelieve the existence of the genuine. There is a sentiment of honest patriotism, and it is one of the purest and noblest that inhabit the heart. It is equally salutary to him that possesses it, and to the country, the object of its regard. It hath a source of consolation, that cheers the heart in those unhappy times when good men are rendered odious, and bad men popular; when great men are made little, and little men are made great. A genuine patriot, above the reach of personal considerations, with his eye and his heart on the honor and happiness of his country, is a character as easy and satisfactory to himself, as venerable in the eyes of the world. While his country enjoys Freedom and Peace, he will rejoice and be thankful; and if it be in the counsel of Heaven to send the storm and the tempest, he meets the tumult of the political elements with composure and dignity. Above fear, above danger, above reproach, he feels that the last end, which can happen to any man, never comes too soon, if he fall in defence of the law and liberty of his country.¹

¹ It is interesting to note that the last sentence of this address and that of the Fryeburg address (p. 521) are almost, word for word, the same, and that nearly half a century later Mr. Webster closed his Speech on the Compromise Measures, United States Senate, July 17, 1850, with the same thought and expression: "No man can suffer too much and no man can fall too soon, if he suffer or if he fall in defence of the liberties and Constitution of his country."

Political Inquiry and Liberty of the Press

MONTHLY ANTHOLOGY, October, 1806.

A Treatise concerning Political Inquiry, and the Liberty of the Press. By Tunis Wortman, counsellor at law. New-York: George Forman, 1800.

WE never made a worse bargain with an honest man, than when we gave the bookseller one hundred cents, for Wortman's Political Inquiry; and yet, if nothing but the quantity of *brass* be regarded, we are hardly losers by the exchange. Mr. Wortman's book has all the properties of a cent, except its currency, and its value. It has as dull a countenance, and as drossy and cumbrous a nature. One can hardly be persuaded to read the first paragraph of a volume of three hundred pages, when the preface contains an insolent boast, under the name of an apology, that the work is produced in a few idle hours, without care or attention. "It is but justice," says Mr. W., "to observe, that the following pages have only occupied the leisure moments of less than four months, and been written amidst the constant interruption of business." There was no necessity for this haste — no eager impatience of the public drove Mr. W. to the press. It is effrontery to introduce to the world, under the imposing title of a "Political Inquiry," a volume, composed in a time almost too short for an amanuensis to copy its pages. The affectation of writing quick is contemptible; yet in this country it too frequently supplies the ambition of writing well. The *calamus currens* is for clerks and secretaries, not for those who would instruct or inform mankind. But, perhaps, it is well that Mr. W. published thus hastily, for if he had taken longer time, there is reason to fear, that, instead of writing better, he would have written more. It is

difficult to say what Mr. W.'s book is, or to what class of productions it belongs. This would be,

"to give to airy nothing
A local habitation and a name."

Its most striking characteristic is the absence of ideas. The reader wades through it, meeting only at great intervals with a sentiment, which deserves either censure or approbation. It is a vast Serbonian bog, where there is nothing to bear up his steps. Every thing sinks beneath him, nor can the eye glance far enough to behold an inch of solid ground, on which to rest its hopes. Declamation, without genius or spirit, false reasoning, without ingenuity enough to be called sophistry, and an inveterate hostility to the rules of grammar and composition, are principal features in this performance. In the very first paragraph he valorously takes up arms against the "monarchic sway" of grammar.

"We will [shall] neither be able to reflect with accuracy," &c.

In the same page he says, "Political institution should emphatically be considered as that science, which proposes for its object the promotion of general felicity." Words may be emphatically spoken, and perhaps, by a figure, emphatically written, but who ever heard of considering, or deliberating on a subject emphatically? Yet, as Mr. W. has no emphasis in his book, perhaps we ought to indulge him in claiming it for his brain.

Farther on, he says, "civil society, as well as her sister sciences"! &c.

We open the book, by accident, at the 65th page, and from that, and those immediately following, will transcribe a few paragraphs, as specimens of Mr. W.'s style and sentiments. The first sentence which meets our eye is this. Speaking of poetry and metaphysics, he observes, "such are the studies which elude the utmost profundity of intellect!" He proceeds. "Not so with rational politics. Every truth is luminous; every principle is clear, perspicuous, and determinable; its doctrines are established in the common sentiments and feelings of mankind; its positions are maintained and enforced by universal experience."

Does not Mr. W. know that political science has, more than any other, divided the opinions of mankind, and that, after a discussion of many centuries, very few principles are yet settled? What "position" of politics is maintained by universal experience? Can he name one, that has been received by the one millionth part of the population of the world since the creation?

In page 67 are these shrewd remarks, "Man, therefore, is the only actor upon whatever theatre human conduct is destined to become exhibited. To whatever object our imagination is extended, to the statesman in the cabinet, the philosopher in his closet, or the hero in the field; wherever we direct our contemplation, to battles and to sieges, negotiations or hostility, treaties of peace, convention of commerce, or declaration of war; it is man that acts and suffers."

Wonderful counsellor! Have you then discovered that human beings alone can be the authors of human actions?

Page 68. "The duties attached to the intercourse of nations and individuals, arise from the *identical fountain of obligation*, and must therefore be, in a great measure, familiar to every understanding."

Page 69. "Without pretensions to superior discernment, every person can as easily perceive what conduct in one nation violates the rights, and operates to the detriment of another, or what acts of a government infallibly terminate in personal injury and oppression. Hence then it is an obvious position, that every intelligent being must necessarily possess a sufficient standard of political discrimination. Can the obstinacy of scepticism demand still farther illustration?" No, no, illustrious Tunis, the "obstinacy of scepticism" is a weak, shivering victim beneath the scimitar of such logic. It doubts of nothing while you reason, although you should attempt to prove the muddiness of your own brain.

In page 171 are the following sentiments, which come "fresh and strong" from the school of Godwin. "It has been rendered sufficiently plain, that a virtuous government cannot become materially injured by misrepresentation; for the most acrimonious and violent invectives will be the most open to detection. Why then should punishment be inflicted? Will

the confinement of my body within a prison, or the removal of my property to the public treasury, render me a better man? Will such severity be calculated to conciliate my affections towards the government? or will it be likely to inspire me with lasting resentment? If I have been guilty of malicious detraction, let corroding envy, sickening jealousy, and vulture passions torture and prey upon my heart. Believe me, I should be punished by misery more aggravated than the horrors of an inquisition."

This is genuine. The disciple has excelled the master. These sentiments are too good to die with a first reading. Let us view them in another shape. The doctrines, which Tunis so ingeniously applies to cases of malicious libel, must be equally applicable to other transgressions of the law. On murder, for instance, he would reason in the same way. "It has been rendered sufficiently plain, that society cannot be materially injured by the death of one individual: for the most barbarous and violent deeds will be the most open to detection. Why then should punishment be inflicted on a murderer? Will the confinement of my body within a prison, will chains or the gallows render me a better man? Will such severity be calculated to conciliate my affections towards society? or will it be likely to inspire me with lasting resentment? If I have been guilty of wilful murder, let corroding envy, sickening jealousy, and vulture passions torture and prey upon my heart. Believe me, I should be punished by misery more aggravated, than all the horrors of hemp!"

Such are the torrents of nonsense, which a man, who calls himself a counsellor, is capable of pouring forth, as a subject closely connected with his professional studies.

Believe us, Mr. Counsellor, if these be your sentiments, the cap and bells would become you more than the long robe, and you would shew better in Bedlam, than the Forum.

Precedents and Dissenting Opinions

MONTHLY ANTHOLOGY, April, 1807.

Vol. I, part I. Feb. term, 1806. Reports of cases argued, and determined, in the Supreme Court of Judicature of the State of New-York. By William Johnson, esquire, counsellor at law — New York, I. Riley & Co. 1806.

THE small series of reports, with which Mr. Johnson has recently favored the profession, is valuable, both on the score of its own merits, and as it gives promise of future productions. If it does not prove that the legal science of our country is perfect, it yet shows that it is meliorating. If the fruits of our judicial systems be not ripe, it proves that, in their natural tendencies, they are ripening. Adjudged cases, well reported, are so many land-marks, to guide erratic opinion. In America the popular sentiment has, at times, been hostile to the practice of deciding cases on precedent, because the people, and lawyers too, have misunderstood their use. Precedents are not statutes. They settle cases, which statutes do not reach. By reference to books, an inquirer collects the opinions and arguments of many great and learned men, on any particular topic. By the aid of these, he discovers principles and relations, inferences and consequences, which no man could instantaneously perceive. He has, at once, a full view of his subject, and arrives without difficulty, to the same conclusion, to which, probably, his own mind would in time have conducted him by a slow and painful process of ratiocination.

But precedents not only assist the judge; they, in a good measure, control him. They tend to bring the judicial system to that excellent condition, in which the law, and not the judge, decides cases. They prevent the substitution of personal opinions for the doctrines of the law. Judges will sometimes affect to play the chancellor, and following an ill-judged

notion of equity, they pursue the phantom, through courses, devious as the serpent's, and dark as midnight. Equity doctrines, combined in questions at common law, tend to annihilate all legal certainty and to confound all principle. The law becomes "without form and void, and darkness is on the face of it." There is a medium. No man, in this age, contends for the illiteral constructions, and black-lettered niceties of the ancient gown-men; nor will a wise man push to the other extreme, and overwhelm all certainty and all rule in the chaos of arbitration principles. A discreet judge will take a middle course. He will neither fly to "the extremity of the west, nor run away beyond Aurora and the Ganges." Settled cases narrow the ground of private opinion. They are useful in enabling the profession correctly to advise their clients. They leave less to the judge, and render the rule more certain. This is the legitimate use of precedents.

We beg Mr. Johnson's pardon, and the reader's, for wandering so far from his book.

The case of *Ludlow et al. vs. Browne et al.*, page 1, seems to be nothing more or less than a question of fact, viz. whether the plaintiffs were *bona fide* owners of the goods in question, or whether they had merely accommodated the French merchants with their names, with the fraudulent design of covering the property with the mask of neutrality. If this point had been decided by a jury, there would have been an end to the cause. The case of *Tucker vs. Jubel et al.*, p. 20, is still more destitute of any question of law. It ought to be expunged from the book.

In the case, *Foot vs. Tracy*, p. 46, the court, notwithstanding it consists of five learned judges, is said to be equally divided. The question is whether, in an action for a libel, the defendant can give in evidence, under the general issue, the general character of the plaintiff in mitigation of damages? Ch. J. Kent and Mr. J. Thompson hold the affirmative; Mr. J. Livingston and Mr. J. Tomkins the negative. Mr. J. Spencer gave no opinion, but the reporter has not favored us with the reason. The impartial balance of the law is thus kept true to its level!

We know of nothing more unhappy for the public, or more discouraging to those engaged in professional pursuits, than

the disagreement of judges. When the ardent inquirer has labored through the tangles of a complicated and ensnarled statement; when he has toiled after counsel up the steep ascent of inference, induction, conclusion; eager to be solved of his doubts, and overborne perhaps by the pressure of contradictory cases and opinions, he looks to the court for final decision, and beholds, depressed and disheartened, uncertainty and doubt emanating even from the oracle! If six months' severe study and reflection could have made the court agree in the case of *Foot vs. Tracy*, the time would have been well expended. Mr. J. has reported above forty cases. Of these, several are questions of practice, which are indeed useful to the junior part of the profession, in introducing them to an acquaintance with the administration of public justice. Perhaps not more than twenty of the cases in this volume involve much difficulty or legal obscurity. In five the most important of these twenty, the court disagree. This seems to be a great portion of causes of that description. We happen to have Cranch's Reports before us, while we write this, a book of about 500 pages, and upon examination we find no case in it, in which the court was divided. In the Court of King's Bench in England eleven successive years have elapsed without presenting a diversity of opinion among the judges in a single case; and perhaps for thirty years, in that court, there was hardly as much difference of opinion on the Bench, as happened in the New York court, in the Term, in which the cases, which Mr. J. reports were heard. The cause of this difference is a subject deserving consideration. Would it not be better, if, in ordinary occasions, but one opinion, and that the opinion of the court were expressed?

The case of the *People vs. Barret and Ward*, p. 66, is a highly important one in the principle it involves, but totally unimportant as a precedent from the disagreement of the judges. Judge Livingston's argument in that case is a happy specimen of juridical reasoning.

In the case, *Foot vs. Tracy*, we observe the marginal abstract is incorrect. The same remark applies to the case of *Livingston vs. Cheetham*, and to that of *New Windsor Turnpike Company vs. Ellison*.

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There are some errors of the press, which we do not note. The type is handsome and the paper good. There is a great deal too much margin on the pages, for any good purpose. Modern books of poetry and plays have already crowded our shelves with white paper. *Ohe, jam satis!* The references to authorities are generally correct and pertinent.

On the whole, we believe the Profession will be thankful to Mr. Johnson, not for making a book, but for making a good one.

The French Language

MONTHLY ANTHOLOGY, December, 1807.

IN a nation of gallants and fine gentlemen, a philosopher would be disappointed not to find a language courteous and graceful, filled with civilities, and easily flexible to compliment. Much of the manners, habits, and sentiments of a nation is indicated by its language; so that the inhabitants of a country may be said to carry their characters upon their tongues. The genius of the French language I take to be *courtesy*. I doubt whether it can be said to possess the softness and passion of the Italian; still more, whether it have the strength and vigor of the English. Yet it must be allowed, that the Gauls are more graceful and decorous in their speech, than their rival neighbors. If I might have my choice, I would make love in Italian; converse with wits and connoisseurs in French; say my prayers in Spanish; and talk to my dog in some of the dialects of the Baltic; but my funeral eulogy should be written in English by Doctor Johnson.

For facetiousness, for playful civility, and easy repartee, the French idiom is unequalled. But the English is better for the purposes of manly commendation, and elegant and elaborate praise. I doubt, whether any language affords a finer specimen of panegyric, than the "Character of Chatham," or whether anything can excel, in dignified commendation, some of the dedications written by Johnson. The French dedicators, with a modesty, which approaches to abject humiliation, throw themselves at the feet of their patrons, and only ask the honor of unbuckling their shoes. Johnson retains the dignity of his own character, while he exalts that of him to whom he speaks. The French throw away extravagant compliment, as if it were of no value: Johnson confers praise, not as if praise were worthless, but as if he were generous.

But when praise rises to romance, the superiority of the English idiom is no more. The imagination travels easier in the loose, flowing, retiring robe of a Parisian belle, than in the stays and buckram of Queen Elizabeth. Nor is it wonderful, since language is a metaphrase of the national character, that the French should excel in the fictitious; for much of the science, and all the virtue of the nation seems to be of that description. The following letter, addressed to a French commander on his gaining a victory, is a translation from that language. Perhaps the critic will see in it little either of the spirit or the idiom of the original.

Elysian Fields, June 20th.

MY LORD: The fame of your actions awakes the dead. It arouses those, who have now slumbered for thirty years, and were destined to slumber to eternity. It compels even silence itself to break forth. What a brilliant, renowned, and glorious conquest have you achieved over the enemies of France! You have restored bread to the city, which has been accustomed to furnish it to all others. You have nourished the nurse-mother of Italy. The thunders of that fleet, which barred your passage to the port, could only celebrate your entrance. Its resistance could not detain you longer, than a reception encumbered with some excess of ceremony. Far from retarding the rapidity of your motions, it could not even interrupt the order of your course. You have constrained the South and the North to obey you. Without chastizing the sea, like Xerxes, you have yet rendered it governable. You have even done much more — you have humbled Spain. After this, what may not be said of you? No — Nature in her prime, and at the age when she created Cæsars and Alexanders, never produced any thing so grand, as under the reign of Louis the Fourteenth. In her decline and debility she hath given to France what Rome could not obtain, at the moment of her utmost vigor and maturity. She hath enabled the world to behold in you, my lord, an instance of that perfect valour, of which we had scarcely formed a notion from romances and heroic poems. Nor should it displease any of your poets, that he cannot say, that you are not known beyond the Cocytus. Your boasting is, my lord, that you have now a common fame on both sides of

the Styx. It hath caused you forever to be remembered in the very abode of oblivion. It hath found you zealous partisans in the regions of indifference. It has engaged Acheron in the interest of the Seine. I will say more—There is not a ghost among us, so devoted to the principles of the Lyceum, so hardened in the school of Zeno, so fortified against joy and against grief, as not to hear you praised with rapture, and clapping his hands, to cry out, “a miracle!”

As for me, my lord, who know you much better than others, I incessantly dream of you. Your idea occupies me entirely in the long hours of repose. Continually do I exclaim, “illustrious personage!” and if I have any desire to live again, it is less to see the light of heaven, than that I might enjoy the supreme happiness of your conversation; and assure you, with my own lips, how respectfully I am, with all the sentiments of my heart,

Your lordship's most humble and most obedient servant,

BALSAC.

Pleading in Civil Actions

MONTHLY ANTHOLOGY, March, 1808.

An elementary Treatise on Pleading in Civil Actions: by Edward Lawes, of the Inner Temple. First American from the first London Edition. Portsmouth, (N. H.) published by Thomas & Tappan, from the press of S. Sewall, 1808, 8vo, pp. 246.

THIS is a production of an eminent pleader, who now does honor to the English bar. Every well meant endeavor to improve this branch of juridical science deserves praise. And when that attempt is successfully made, as in the present case, the author is worthy of double honor. If a work of this kind should be found useful in England, it will be much more so in this country, where the science of pleading has been but little cultivated. We are told by Littleton, that good pleading is one of the most honorable, profitable, and laudable things in the law. We have no doubt the author of the book before us, has found it profitable, and he may, perhaps, safely calculate that it will lead to honor. Without a competent knowledge of this branch of the law, no one, in England, can hope to attain any degree of eminence in the profession, and with it, he may hope to rise to a seat on the bench. Most of the present English judges were eminent special pleaders. Though a seat on the bench is not, with us, so much a reward of merit, as a burthen imposed on those, who have the misfortune to be distinguished at the bar, yet, to them, this branch of knowledge is honorable and laudable, and, to the state, who reap the benefits of their learned labors, it is in the highest degree profitable.

The author modestly considers this essay as designed for the use of pupils, on their entrance upon the study of pleading, and as an introduction to a work on the same subject, which

he has formed and partly executed, on a comprehensive plan, intended for the use of the profession at large. We are pleased to find it thus early republished here, and have no doubt that it will be found highly useful to all branches of the profession. It is certainly superior to anything on the subject of which the profession were before in possession. The Title Pleader, in Comyns Digest, was the best thing of its kind at the time of its publication. The Treatise on Pleas and Pleading, in Bacon's Abridgement, though perhaps the best part of the book, with a single exception, wants method and arrangement, and is otherwise defective. Besides, both these Treatises are become antiquated. From Wooddison's Lectures every student has derived advantage; but that part, which treats on pleading, though very good, is too short even for an outline.

In the present treatise, the arrangement is happy, and the statements perspicuous. Though elementary, it will be found comprehensive and instructive. It exhibits, in the smallest possible compass, a systematic view of the present law of pleading in civil actions, and till the larger work appears, the student will do well to employ himself in filling up the outline here sketched. With attention and diligence on his side, he can hardly fail of deriving much profit from his labors. In the first chapter, the author, or, as he modestly styles himself, the compiler, treats of pleading in general, and its history. He has availed himself of the labors of Hale, Blackstone, Reeves, &c. and has thrown together, in a few pages, a number of facts and observations, which furnish an entertaining and useful historical view of the doctrine of pleading.

It is impossible to read this account without perceiving the advantage to suitors and to the administration of justice, from pleadings which combine brevity, perspicuity, and certainty. The end proposed by the pleadings is, to bring the matters in controversy to a point, material in itself, and unambiguous, so that neither the court nor the jury may be perplexed with the consideration of a multiplicity of matters at the same time, or in other words, to extract, like an equation in algebra, the real points in controversy, and to refer them, with all possible simplicity, to the court or jury. Hence the propriety of the rules, which require that the allegations of the parties, on the

record, should be direct, concise, clear, sensible, exact, certain and formal. Those who may be disposed to think that pleading favors too much of nicety and technical exactness, ought to recollect, that we have the evidence of those who have the best means of knowing, that good pleading greatly contributes to the advancement of justice, and the speedy decision of right, and that ambiguous, informal, and irregular pleadings tend to delay, expense, injustice, and to the great increase of litigation.

It is possible, indeed, that the rules of pleading may, in some cases, be too scrupulously used, and that judges may give a quicker ear to nice exceptions, than they ought. But it is apprehended, that there is, at present, more reason to guard against the contrary extreme. If Lord Coke could say, in his time, "that many a good cause is daily lost for want of good and orderly pleading;" the complaint is still better founded at this day, and in this country: and we may with confidence assert, that more causes have been lost, and money misspent, for want of good pleading, than from the want of good speaking at the bar. Pleading, like everything else, may be abused, and we have no doubt has been, at times, to the purpose of chicane. But the loose way of conducting the pleadings in our courts, in times past, has been the occasion of much uncertainty and perplexity, both with the jury and on the bench.

In this chapter, we observe, the author pays a deserved compliment to Saunders, and to Serjeant Williams' excellent edition of that able work. This book we recommend, without any hesitation, to the profession; with the notes, it is one of the most useful books in a lawyer's library. We cannot forbear likewise to recommend to the profession Tidd's Practice, as a work of considerable legal learning and great accuracy. Without a competent knowledge of English practice, many of the books of reports, are either unintelligible, or lead to error in the application. A work of this kind, executed with equal skill and accuracy, concerning our practice, would be highly useful. We believe that practice will never attain to any good degree of correctness, utility, and certainty, till its rules are reduced to writing, and the decisions of our courts, on this subject, preserved and published.

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In the second chapter, the author treats, in a general way, of the several divisions of pleading. In the third, he proceeds to lay down the rules applicable to all those several divisions. In the succeeding chapters, he lays down some of the most obvious rules, peculiar to each division. His manner of doing it: first, considering the narrative part, and then the formal is just, and contributes, not a little, to the clear understanding and retaining in the memory the rules of pleading. His style is neat and simple. He seldom states an opinion of his own, but refers to the cases, and generally uses the very words of the court in giving judgment.

In the last chapter, the author treats of a few miscellaneous heads of pleading, which did not fall within any of the former divisions.

The first chapter of the appendix is the most curious and entertaining, if not the most useful part of the work before us. It gives specimens of the different style of pleading, at three different periods of the law, viz. the reign of Edward the third, Charles the second, and the present time. The appendix to the other chapters, with the notes, will be found useful to the diligent student, as furnishing examples for taking precedents, as well as explanations of the several forms alluded to in the body of the work. Indeed nothing has a greater tendency, clearly and firmly, to impress the different parts and rules of pleading on the memory, than analysing and annotating on precedents. Perhaps the best way of teaching the rules of pleading, would be to write notes on precedents.

Notwithstanding the table of the chapters and the regular distribution of the subject, furnish the means of finding what we wish, without much labor, yet we think the work would be improved by an index. Authors are sometimes induced, by a sort of pride, to decline this labor, as one that has less of honor than profit. But the example of Judge Blackstone deserves imitation, who has not only written the best book, but has given us the most perfect index to its valuable contents. Though the author does not hold forth his book as a complete work, but as merely designed to give a clear, general and elementary view of the subject, and nothing further; yet that may be truly said of it, which cannot be said of most modern

productions, that it contains much valuable matter, in a small compass.

We sincerely hope, the professional engagements of this respectable lawyer, will not long delay the publication of the larger work he has announced, and in the mean time, that this essay may stimulate the researches of some lover of the science, among ourselves, to point out the additions to, and variations from the English forms and principles, which our statutes and approved usages have made necessary and sanctioned.

A correct treatise on the pleading in real actions, as used in this state, (a subject, almost totally neglected in this work,) would be a great desideratum. The modern books in a lawyer's office, furnish little light, and it requires an ardor and courage, which few possess, to draw this species of knowledge from the ancient fountains.

Considerations on the Embargo Laws

1808.¹

Are the Embargo Laws Constitutional?

THE Government of the United States is a delegated, *limited* Government. Congress does not possess *all* the powers of Legislation. The individual States were originally complete sovereignties. They were so many distinct nations, rightfully possessing and exercising, each within its own jurisdiction, all the attributes of supreme power.

By the Constitution, they mutually agreed to form a General Government, and to surrender a part of their powers, not the whole, into the hands of this Government. Having, in the Constitution described, the form which they intended the new Government should take, they, in the next place, declare precisely what powers they give it; and having thus cautiously described and defined the powers which they give to the General Government, they then, for greater security, expressly declare, that “the powers not delegated to the United States, by the Constitution, are reserved to the States respectively, or to the people.”

This is the plain theory of the national Constitution. To determine, therefore, whether Congress have a Constitutional right to lay an Embargo, we must look at their charter. If the Constitution gives them such a right, they have it; if the Constitution does not give such a right, then they do not possess it.

¹ From the pamphlet in the Massachusetts Historical Society.

“August, 1812, I wrote the Rockingham Memorial. . . Before this, I think in 1808, I had written the little pamphlet, lately rescued from oblivion, called ‘Considerations on the Embargo Laws.’” (Autobiography of Daniel Webster.)

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It is clear, that the power of laying an Embargo is not, in so many express words, given to Congress by the Constitution.

If they possess such a power at all, they hold it under a clause in the 8th Sect. of the first Art. which says that Congress shall have power

“To Regulate Commerce with Foreign Nations.”

It is admitted, on all hands, that no other article or section confers the power ; and that if these words do not give it, then it is not given.

“To regulate Commerce,” is an expression not difficult to be understood. To regulate, is to direct, to adjust, to improve. The laws respecting duties, drawbacks, ports of entry, the registry, the sale, and the survey of vessels are all so many laws “regulating commerce.”

To regulate, one would think, could never mean to destroy. When we send our watches to be regulated, our intention is, not that their motion be altogether stopped, but that it be corrected. We do not request the watchmaker to prevent them from going at all, but to cause them to go better.

If one were authorized to regulate the affairs of Government, he would not think of arresting its course altogether — of abolishing all office, and abrogating all law — this would be destroying ; but he might, perhaps alter, and correct ; and this would be regulating.

The Embargo laid in the year 1794 under Washington’s administration, comports strictly with this definition of *regulation*.

It was limited to sixty days.

Its object was, to give the merchant notice of his dangers, and having done this, to leave him to his own discretion.

It was intended for the benefit of commerce alone. It had no extraneous object.

When the merchant was apprised of his danger ; when he had availed himself of all the knowledge which the Government could communicate ; when he had ascertained, in what channels he might pursue his accustomed trade, and in what he might not ; the Embargo then expired, and our vessels once more sought their proper element.

The same motive which led Government to lay the Embargo, led it at the same time, unasked, unsolicited, to a full and perfect disclosure of all the information it possessed, relative to our foreign regulations.

Thus, by General Washington's Embargo of sixty days, nothing was sought but the protection, the preservation, the regulation of commerce.

The present Embargo is unlike that, in many material points.

It is unlimited in point of time.

An unlimited suspension of commerce approaches as near to its destruction, as the indefinite suspension of breath does to the destruction of animal life. In either case, relief may come soon enough to prevent the effect—but it may not. If it be conceded, that Congress have not a constitutional right to annihilate commerce, as one of the leading interests of the country, there seems to be an end of the argument; for no man doubts, that a law laying an Embargo for an indefinite time, must, if left to its own operation, produce the total annihilation of all the commerce of the country; because such a law never can expire. It is true, that the effect may be prevented by a second law repealing the first; but how can the constitutionality of a law depend on a second law repealing it?

The present Embargo differs from that of 1794 in object. It is not intended as a measure of precaution, to forewarn the merchant of his danger, and then leave him to his own discretion.

It is used as an Instrument of War. Its avowed object is, to reduce the powers of Europe to the necessity of complying with our terms. It is advocated, as a powerful means of annoying foreign nations.

This, it would seem, is not regulating commerce by an Embargo; it is making war by an Embargo. It is, in effect, carrying on war, at the expense of one class of the community.

It is difficult to understand, how an Embargo, universal in extent, and unlimited in duration, imposed for the express purpose of waging war against foreign nations, and of compelling them to come to amicable terms, by a powerful assault on their interests—it is difficult to understand how such a mea-

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sure is a mere regulation of commerce. It would certainly look more like its annihilation.

There is little hazard in saying, that if the commercial States had thus understood the Constitution, they never would have agreed to it. They never would have consented, that Congress should have power to force them to relinquish the ocean, and to cut them off from one of their great and leading pursuits.

It is impossible to believe that they understood such a power to be given to Congress, under the authority of regulating commerce.

What Were the True Causes of the Embargo?

The General Embargo law was passed in consequence of the President's recommendation, communicated to Congress by Message, December 18, 1807.

The only object which the President pretended to have in view, in recommending this measure, was "the keeping in safety our vessels, seamen and merchandise."

This was his only ostensible object.

It is easy to show that it could not have been his real one.

In the first place, the "safety of our vessels, seamen and merchandise," did not require a perpetual Embargo. If the President had embargoed our commerce for thirty, or sixty days, and immediately made public the information which the Government possessed relative to our affairs abroad, instead of keeping all information locked up in the Cabinet, the merchants could have decided for themselves, on the expediency of sending out vessels; and they are certainly the best judges of their own risks, and their own interest.

In the next place, the "safety of our vessels, seamen, and merchandise" did not require an universal Embargo.

All our commerce was not endangered either by the French Decrees, or the British Orders of Council. It has indeed been said by Mr. Nicholas, one of the members of Congress who voted for the Embargo, and who is now laboring to rescue his reputation from the consequences of it, that if the embargo were off, "not a ship of ours could sail, which would not be subject to seizure and confiscation, by one or other of the bel-

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ligerents, unless she were going to the bare kingdom of Sweden."

This is either a gross mistake, or an intentional misrepresentation. We will here enumerate the places to which our vessels might sail, without being subject to seizure and confiscation, under the British orders, or French decrees, and we will add the amount of produce, foreign and domestic, annually exported from the United States to those places, according to official documents :

	Domestic.	Foreign.
To Swedish West Indies	Dols. 416,509	Dols. 911,155
Madeira	528,378	69,194
Azores	21,957	14,976
Cape de Verds	15,237	44,113
Morocco and Barbary states	8,358	34,934
China	84,023	113,258
Africa	369,924	1,026,682
South Seas	3,385	5,266
N. W. coast of America	10,777	92,933
Florida	146,376	537,178
Spanish W. Indies & colonies	2,470,472	9,871,753
Campeachy & Musquitshore	146,376	527,178
Canaries	158,730	208,659
Turkey, Levant and Egypt	4,520	424,855
French W. Indies	2,901,516	2,968,816
Bourbon and Mauritas	145,247	149,191
Dutch East Indies	79,880	360,836

It will be clearly discovered that it is owing to the British orders in council not pursuing the French decrees in their injustice to the full extent, that our trade to the Spanish, French and Dutch colonies, is left without interruption, and amounts to six millions of our domestic, and upwards of fourteen millions of foreign produce.

On the 23rd of November, a committee of merchants in London having desired an explanation of the orders in council of the 11th of that month, the following is the explanation given by order in council.

"American vessels may proceed from the ports of the United States to the ports of the colonies belonging to the enemy, and direct back to the ports of the United States."

If therefore, the safety of our vessels, seamen and merchandise had been the President's real and only object in laying the Embargo, he unquestionably would have exempted from its operation, all vessels bound to the foregoing places.

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But there is yet another consideration which alone is complete demonstration, that the safety of our vessels, seamen and merchandise, was not the true cause of the Embargo. When the mouth speaks one language, and the conduct another, we all know which we are to believe. When a man's pretensions are utterly inconsistent with his actions, his pretensions must be false.

If the safety of our ships and merchandise was the true cause of the Embargo, why were the supplementary acts passed, prohibiting all intercourse with Canada and New-Brunswick? It surely could not endanger our vessels, or seamen, or merchandise, for a Vermont farmer to go into Canada and sell his potash; or for a British subject to come over the line and buy it.

The moment the President put his hand to the supplementary law, he directly negatived the truth of his message. He made a complete admission, that his real motive in recommending the Embargo was not such as the message represented.

A member of Congress has indeed gravely said, that trade with Canada and New Brunswick was prohibited, in order that "the sufferings of our citizens might be made equal!" What! — if Congress think it necessary by an Embargo, to distress one portion of the community, will they also, although it is not necessary, distress the rest, in order to make "the suffering equal?" This is as if your physician should draw *one* of your teeth, because it ached, and should then propose to draw another, from the other side of your face, which did not ache, in order to make the "suffering equal!"

It is worse to bear the insult of such arguments, than to endure the pressure of such measures.

On the whole, it is demonstrated, it may be asserted in a tone that defies contradiction, that the motive assigned for laying the Embargo, was never the true motive.

It is now said, that the Embargo was laid, for the purpose of bringing France and England to just terms of settlement with us, by withholding our produce, and thereby starving the inhabitants of their colonies in the West Indies.

That the Embargo was intended to operate as a measure of hostility against England, there is no doubt; but that it was

intended to be equally hostile to England and France ; or that the Government expected from it a revocation of the British orders of council and the French decrees, no man, who will consider the subject, can possibly believe.

Everybody knows, that in all rich and civilized countries, the quantity of food actually consumed is at least twenty times as great as the absolute necessity of life requires ; and every reader of history has observed, that a single town, covered with a thick population, situated perhaps on a barren rock, has resisted, for months, and years, every attempt to reduce it by famine. And yet the United States, by the mere operation of withholding their flour, expect to reduce the West India colonies to such a state of want and distress, that, to relieve them, England and France will be compelled to repeal their orders and decrees !

Many of the West India Islands have a fine, exuberant soil. A warm sun, rolling vertically over it, fructifies and stimulates it, to the production of two harvests a year. They are, moreover, in the neighborhood of the rice countries, on the Spanish Main, and everywhere accessible by sea. Will any man believe, for a moment, that Mr. Jefferson could be so wild and credulous, as to think of starving these Islands ? That they experience inconvenience from the loss of our trade is certain, because it is an interruption of their ordinary business ; but they suffer no more than we do, and probably not so much.

It would be a good deal ridiculous, if the merchants of Portsmouth should conspire to freeze the inhabitants of the County of Rockingham next winter, by refusing to sell them broad-cloth and kerseymere. Every one would see, that few people would be likely to perish, in consequence of such an Embargo. It might be a trifling inconvenience ; because many of them have been accustomed to purchase those articles in that town. But if the mercantile gentry should take such airs, the farmers would laugh at them. They could purchase their articles elsewhere, or do without them.

It is just as ridiculous, for the United States to think of starving the West India colonies.

We appeal to experience. What has been the fact ? The Embargo has now been imposed for more than seven months.

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Has it produced any effect? Has it starved anybody? Not at all. Do the Islanders grow clamorous? Do they rise in rebellion, and cut the throats of their Governors for want of food? Not at all. Flour, especially in some of the Islands, is dear. But still they have flour. They suffer inconvenience; but they suffer it without impatience and without mortification, for it is not the consequence of their own folly. We speak of the Islanders; to them these consolations belong, while they can behold a people, who suffer severely, in a foolish attempt to inflict distress on others.

In short, the administration papers are compelled to admit, that the Embargo has not produced such an effect on the West India colonies, as to induce the mother countries to any relaxation of their systems.

It is even admitted that it is not likely, by its further continuance, to produce any such consequences.

This is the language of the National Intelligencer. Why then is it continued? If it was laid to accomplish an object, which it has not accomplished, and which its advocates admit it never can accomplish, why is it not taken off? Why is this bondage continued, when it has not only not produced the intended effect, but when it is admitted that it never can produce it?

These considerations show us conclusively that the Government did not adopt the Embargo system, from an expectation that it would compel England and France to rescind their orders and decrees. If they had, they would have abandoned the system, when they abandoned all hope of producing that effect by it.

What then was the real cause of the Embargo? Until some new light is thrown on this subject, we shall be compelled to believe, that the Embargo originated in a wish in our Government to favor France, and to take side with her in the war against Great Britain. Great Britain is a commercial country. She feels the Embargo more than France. She does not, indeed, by any means, feel it as severely, as it was expected she would; but still she feels it, in her trade, to a considerable degree, and Bonaparte whose undivided object is to destroy her, and root her out from among the nations, will-

ingly bears his portion of the inconvenience, for the sake of seeing a greater portion borne by his enemy.

It is not material to consider, whether this partiality for France arises from the fear or the love of her. That it exists is certain. The administration party are perpetually singing the praises of the French Emperor. They rejoice in his successes, and justify and applaud his most enormous acts of injustice and oppression. Even when he marched his army to Spain, overturned its Government, traitorously dethroned its sovereign, and murdered one of its Princes, subjugated its provinces, and placed a plundering and blood-thirsty creature of his own on the throne of the last branch of the ill-fated House of Bourbon, they burst forth in exclamations of rapturous and unhallowed joy, at the progress of successful guilt and violence. They even blasphemed Heaven, and mocked it with diabolical gratitude, when they thanked God that the world was blessed with this detestable tyrant, and that society was like to regain its ancient peace and dignity under his iron sway! *

That Mr. Jefferson, or Mr. Madison runs to this excess of adulation we do not assert. But we do assert, that the newspapers under their most immediate patronage and inspection, clearly intimate that we are to have an English war. Nay some of them openly avow it to be both their wish and their expectation. Even the *Intelligencer* is wound up to a high war note, and is obviously laboring to prepare the minds of the people for a British war. When we have a British war we of course have a French Alliance, and surrender our liberties and independence to the protection of Bonaparte!

The Embargo was laid for the same reason that, at the instance of the French Minister, we prohibited all intercourse with the Independent Government of St. Domingo; —

For the same reason, that we prohibit, by law, the importation of British commodities, while we do not prohibit the importation of French Commodities;

For the same reason that we forbid British vessels of war to approach our shores, while we freely admit the French to the use of our waters, ports and harbors.

* See the *Boston Chronicle* and other democratic papers.

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When a calculation is made on the effects of the Embargo, it is on its effects upon Great Britain.

Nobody inquires what effect it has produced on France. Every democratic Newspaper on the continent, treats the subjects as if it respected Britain alone. "Do her colonies revolt? Are her manufacturers seditious? Is her government terrified? Does it relent, and relax its orders?" These are the standing inquiries, while no one is at the trouble of asking, how it affects the Emperor of France. All this proves to us, if proof we wanted, that the Embargo is exclusively an Anti-British measure; tending to irritate that nation; to increase and aggravate the difficulties between its Government and our own; and finally, to provide for this devoted land the blessings of a British war, and a French Alliance.

What Are Its Effects?

Abroad, it has produced, as was natural it should, still further irritation. It has widened the breach, and is bringing us every day nearer to open war. At home it has produced effects, which every man beholds.

"In a commercial point of view, it has annihilated our trade; in an agricultural point of view, it has paralyzed industry. I have heard that the touch of Midas converted everything into gold; but the Embargo law, like the head of Medusa, turns everything to stone. Our most fertile lands are reduced to sterility, so far as it respects our surplus produce.

"As a measure of political economics, it will drive (if continued) our seamen into foreign employ—and our fishermen to foreign Land Banks.

"In a financial point of view, it has dried up our revenue, and if continued will close the sales of Western Lands, and the payment of instalments of past sales—for unless produce can be sold, payments cannot be made."

To this we add an extract from a letter of Mr. Lyon, one of the Democratic members of Congress, to his constituents.

"It is allowed on all hands that our embargo has been the cause of immense losses and distress by disappointments, besides the loss of more than twenty millions of dollars, to which amount

the surplus produce of our country mostly in the hands of the farmer or planter has sunk in value, the revenue for the first six months only cannot fail of being eventually cut short six millions. It has caused very many bankruptcies, it has thrown out of employment thousands of mechanics and laborers in commercial places, and driven their families to poverty and ruin; it is driving from us into the service of the British monarch, those very seamen, the regaining and security of whom, has been one of the greatest objects of our negotiation with the British government, for several years. These are serious losses to us; we are not informed of the whole losses of the belligerents whom it was intended to effect. After the news had been in Europe near four (now six) months, we can yet see no great effect it has had.

“The men who formerly fished to supply American vessels for the West India market, are now either starving or catching fish in English boats, or English vessels, to be carried to the same market; so that there can be no hope of any good from this starvation system.”

This numeration of losses does not comprise the very great and severe one experienced by the ship owners, in the decay and destruction of their vessels; a loss which must have already amounted to more than twenty millions. The bounty of Providence hath, this season, loaded our fields with a most extraordinary harvest, the surplus of which, beyond what the necessities of each family require, is to be added to the already enormous list of losses in consequence of the Embargo.

Such is the Embargo; such the doubts of its constitutionality; such its obvious causes; such its serious consequences.

The State of Our Literature

1809.¹

THE laws of nature are confined to no sphere, and bounded by no limits. They are as universal as her works. The world of mind is the theatre of her legislation, not less than the world of matter. In each exists the same fixed relation between cause and effect. The same immutable principle which forbids flowers to blossom on Arabia's sands, or Zembla's rocks, forbids, also, the productions of taste and literature to spring in the soil of uncultivated minds. The smallest atom that floats in air, is resolvable into some one, or more, of the great elements, which compose the universe, and the most transient idea, that passes in the brain, may be traced to some determinate circumstance of intellectual education.

Man, then, in his mental powers, and in his moral sentiments, is the creature of cultivation. He is what this makes him, and this is almost the only position, which in the abstract can be asserted of him. The picture is portrayed in changeable colors. It exhibits bright or dark sides, lustre or shade, according to the quarter from which light is thrown upon it. The original elements of human nature, differently blended and combined, by the chemistry of moral, political, and literary education, exhibit man, under the different aspects which he wears, between barbarism and refinement, the forest, and the forum. This improvable principle in human nature, is the

¹ An Address delivered before the Phi Beta Kappa Society of Dartmouth College, in the Summer of 1809. From the original manuscript, in Mr. Webster's handwriting, in the Greenough Collection.

"As far as I remember, I had hardly put pen to paper, when I left Boscawen, to deliver it. Much was written on the road — and many things were conned over and delivered which were never written at all." From a Memorandum in Mr. Webster's handwriting, addressed to George Ticknor, in the Greenough Collection.

foundation of all literary exertion. The patronage of the arts and sciences flows from this source. It is because talents abound, where there are inducements to draw them forth, that in the most civilized nations, literary exertion hath been solicited by the most flattering enticements. Praise and reward are the merited remunerations of genius; and as these are bestowed sparingly, or generously, so the state of the community is ignorant or learned. Literary patronage, therefore, is not a chimera. No more than the sun is a chimera to the farmer's hopes. Learning is not the spontaneous, self planted, self supported oak of the forest. It is the plant of our gardens; and the vigor of its growth, the extension of its branches, the beauty of its foliage, and the value of its fruit, are proportioned, not less to the skill of the cultivator, than to the strength of native soil.

On this occasion, in the midst of my friends, and in that village of my native State which claims to be the seat of its literature, it is more the wish of my heart, to be useful, as a man, than to be splendid or declamatory as an orator. I appreciate higher that part of my reputation, which is involved in the general reputation of this District of the Community, than of that individual portion which appertains only to myself. Indulge me, therefore, in a few brief and desultory remarks on the State of our Literature.

That this Country, or this age, is not distinguished by uncommon literary zeal, I suppose need not be proved, altho' patriotism would suppress the avowal, if the authority of patriotism were greater than that of truth. The Northern section of the Union hath the praise of having disseminated the elements of knowledge more generally than hath been done at any other time or place. With this credit, we seem willing to balance the account, and sit down contented. Literary efforts of the higher order have been unfrequently made, and still more unfrequently successful. Yet, as the broadest foundation will support the loftiest structure, so the widest diffusion of elementary principles would seem to afford the best basis for capital performances. The deficiency is ascribable to nothing but the poverty of literary spirit. Like the barbarian who treads, heedless of their value, on the pearl and

B. P. B. K.

This is poorly written - As far as I remember,
I had hardly got from the paper, when I left
~~the~~ Des caner, to deliver it - Much was written
in the road - I saw many things were covered over
I don't think were never written at all -
- I have turned down two leaves, I should too
short passages - I find, on one of them, a good
round above of the Prof - which is in my be-
lief due to Davis' own.

THE PHI BETA KAPPA ADDRESS

Memorandum to George Ticknor in Mr. Webster's Handwriting



the topaz which the ocean washes to his feet, we slumber on the best means of scientific improvement, ignorant of their worth. A want of literary spirit is followed by a dearth of literary production. Taste to relish the works of genius, and a disposition to praise and reward it, must in every [case] precede its efforts. Genius will not display itself unpatronized, and unregarded. It is coy, and will be wooed; it is proud, and must be soothed. You will not hear its voice in poetry, nor behold its wonders on canvas, while it cannot command admiring auditors, and applauding spectators. Society must be made susceptible of the powers of genius, before it will display them. Horace and Virgil will never be heard to sing to untuned ears; nor will the statue of Apelles be found in forests, to be gazed at by the rude eye of barbarism.

But not to speak of Poetry, which hath hitherto appeared in this State no where but in the corner of a newsprint; not to speak of painting and sculpture, the terms and language of which are unknown even in our best schools, it is sufficiently characteristic to remark, that there is no depository, where are collecting documents for our own history. Nothing like a historical society exists in this State. The future historian will find no materials to facilitate his labors, other than the garbled, false, senseless columns of putrefied factious newspapers, which shed visible darkness on every topic they mention, and from which the historian can by no possibility elicit truth, unless, like Esop's fowl, he should, by chance, scratch the jewel out of the dirt. A historical society is one of the most easy, and useful associations of literary men. It is [an] object of primary consideration, in every country that is desirous of giving its history to posterity.

Is it still more incredible, that in a community, where agriculture is the great leading interest of all classes, no two minds should combine their powers to facilitate its improvement? That there should be no union of effort, no concert, no comparison of experiments? That all should be left to individual enterprise, and the few improvements which are made, should owe their existence to chance, or accident? The tillers of the soil have certainly a right to expect that men of science will lend them the aids of their knowledge. An agri-

cultural society, formed on principles broad enough to embrace such objects of natural history as are connected with husbandry, is an establishment, which long, long ere this, should have been effected.

This apathy in the pursuit of literary and scientific objects hath undoubtedly its causes. In searching for these, we are to direct our inquiries to the ruling passion of the Country. This absorbs all other sentiments. We look on Aaron's serpent, and see him swallow up all the rest. It hath, indeed, been said that America is yet too young to imbibe an ardor for letters. That she can hardly expect even works of mediocrity for years yet to come. That seven centuries from the foundation of Rome were hardly sufficient to produce Horace and Virgil, Hortensius and Cicero. That when as many years have rolled by from the landing of our Fathers, as from Romulus to Augustus, we may then expect great poets, orators, and historians. No reasons from analogy can apply among nations so entirely dissimilar. Rome set out in the career of national existence completely barbarous. She got up out of her cradle an infant savage, with all the wolf in her blood. She was profoundly ignorant of first elements. She began at her alphabet. America, on the contrary, commenced her existence, at a time when the sources of knowledge were unfolded, and the human mind was bounding forward, in the path of improvement. Her first colonists were scholars. Raleigh, Smith, Penn, Robinson — are such names found in the first page of Roman story? No nation can trace so certain and so honorable an ancestry as America. It runs not back to clans of ravishers and robbers, nor to the lair of the foster mother of Romulus. Nor is it enveloped in Feudal ignorance, or Druidical mystery. It is the plantation of enlightened men, from the best informed nations of Europe, in a new country, who were anxious to strew the seeds of knowledge at the birth and beginning of their Republic.

An inordinate ambition to accumulate wealth forms a prominent feature in the character of this country. The love of gold is the ruling passion, and of all passions this is the most hostile to literary improvement. There is a liberal pursuit of wealth which well consists with the interests of science; which

while it accumulates princely private fortunes, endows colleges, rewards the efforts of genius, and gives spirit to all intellectual exertions — and there is a mean, monkish, idolatrous devotion to it, which when once enthroned in the heart, banishes thence every generous sentiment. Where this grovelling, dust-loving propensity predominates, literature can make little progress. It will not even have a patient hearing, while it addresses this surly inhabitant of the heart. The powers of Midas, whose touch turned every thing to gold, would there command more admiration, and find a better market, than the genius of Homer or Demosthenes. Yet cause and effect here reciprocate. The diffusion of taste and knowledge will unlock the frozen avaricious heart, and when its ices are warmed, it will then be inclined, in its turn, to cherish the causes from which it is made capable of deriving pleasure.

The character of a country is as correctly estimated by the attention which is paid to literary institutions, as by any one criterion. Colleges grow with the taste and science of their country. They form an important item in national character. They are worthy the most solicitous regard of Government. Of all the duties of legislators, no one is more pleasant, or more important than to foster those institutions which disseminate morals and knowledge among mankind. Am I heard by legislators? By those, to whom is consigned the highest trusts of society? I would say, as you value your country's glory or your own fame, rear high the fabric of national knowledge. Reach forth to your university no reluctant, no empty hand. Is social man, refined from the grosser parts of his nature by science, and from its depraved parts, by the influence of the true religion, a more pleasing object, in the contemplation of Deity, than the idolatrous tenant of the wilderness? You are possessed of the means of throwing the lights of science and religion far around you. The duty is a high and responsible one, and posterity will require a faithful discharge of it. It is however, to be hoped, that when legislators endow colleges, they will take the precaution to give what is their own. That they will not wring from the hard hands of peasants their vile trash by any indirection, and claim for it the merits of a liberal donation. Neither the happiness nor the

glory of nations is measured by their acres. The legislator, who drains his own purse and that of his country to the last shilling, for the purchase of tractless marshes and illimitable hunting grounds, ought to complete his character, by assuming the bow and arrow and tomahawk.

The passion for wealth is nationally inordinate. Legislators need not cherish it. To every purpose of happiness, nations not unfrequently grow rich too fast. It is the duty, and in a great measure in the power of Government, to enlarge and liberalize this passion, to induce the individual to embrace public, as well as private views, and blend his own interest with the best interests of the community.

Another impediment to the advancement of literature is the pursuit of politics. This is little less deleterious, than unbounded avarice. Let me not be understood to denounce politics, as a science. The theory of Government is one of the first of sciences. I mean the mad strife of temporary parties, the rancor of conflicting interests, and jarring opinions. These are vials of wrath the contents of which scorch and consume all that is desirable and lovely in society. The strife of politics never made a great, or a good man. Its unvarying tendency is to belittle greatness, and corrupt goodness. It contracts the mind, and hardens the heart. It hath yet enticements which too easily beguile the youthful mind, ambitious of public notice, into its contentious paths. It flatters, with the view of immediate eminence, and the temptation is too strong for inexperienced hearts. But political fame, as it rests on the passions of men, and not on their understandings, is a baseless fabric. The champion of a political party appears, and struts his little hour upon the stage, and straight is heard no more. A character, destitute of intrinsic merit, of genius, or of learning, and renowned only because his faction is triumphant, is like a small statue on a tall pedestal. His elevation only serves to diminish him. To give to such a character permanent greatness, to bestow on him fame, that shall last longer than his own bones, is more absurd than was the scheme of Alexander, to carve Mount Athos to the form of man.

Let ambitious genius beware, how it plants itself on the arid soil of political contention. Let it never, for a moment,

forsake the altars of taste and wit, for the clamor of faction. "Politics are transitory ; wit is eternal." Let genius pursue those paths to fame, which alone have been successfully trodden. Whether its range be amid the fine arts, or the abstruse sciences ; whether it invoke the muses or travel to the stars, fame will accompany it. The elegant of literature is no less imperishable, than the profound. The beauties of the Corinthian will as effectually resist the war of the elements, as the solidity of the Tuscan column. Let the emulous youth who pants for renown, think and act for posterity, and posterity will appreciate the obligation. Disregarding momentary considerations, let him build on a lasting foundation. Thus shall he make to himself an honorable name, when the bloated bubbles, who float only on the surface of political success, shall have dropped out of existence and left no vacuity.

The splendid purple robe of civic power, often leads us to believe that it covers vast learning and ability ; when in fact it is merely coiled round much pride and vanity, with some imperceptible mixtures of sense and intellect. Even learned professors and fellows, though accustomed to gaze on the unclouded radiance of the sun, cannot yet look on the brilliant robe of popularity and power, without being so much dazzled as not to be able to peer through it, on to the barrenness within. Hence the ivy crown is sometimes woven around undeserving heads. When the splendor of a little brief authority is withdrawn, the dispensers of literary honors, perhaps, find the object of their regard and civility quite a new being. They then call for their microscopes, and search assiduously for those sparks of understanding and information, the bright blaze of which had before so much dazzled and confounded them. Indeed collegiate honors are in danger of losing some portion of that high estimation, which ought to be attached to them. The profuse manufacture of the article, hath diminished the value. The market is overstocked. About the old universities of Europe, Doctors thicken in their ranks, till distinction consists in not belonging to the corps. In some of these ancient corrupt institutions, degrees are sold for cash ; in others, for flattery. As a fool's money is certainly worth more than his praise, so the former practice is less censurable than the latter.

Literary honors are appropriate to literary men. They are the merited rewards of genius and industry ; of genius, that lights up new stars, and new suns in the firmament of science ; and of industry, that pale and friendless, consumes o'er the midnight lamp for the benefit of mankind. They are not, in the name of all that is science I protest — they are not to be nailed on to the head of everyone, who happens to have been a fortunate navigator, in the *mare schismaticum* of politics ! From this reflection on the folly and profligacy of the ancient seminaries of Europe, the mind turns weary and disquieted, to cheer itself with the abundant consolation, that the conduct of our own colleges hath been, in every instance, vastly more wise and discreet.

The duty of the American scholar grows out of the circumstances of his country. If the causes which have been suggested, have influence in retarding the growth of the sciences, the obstacles to be overpowered are then described. To warm the apathy, to subdue the avarice, to soften the political asperity, of the nation, are the objects for the prosecution of which every man of letters stands pledged to the cause he hath espoused. The undertaking tho' arduous, is not hopeless. Every motive of duty and patriotism conspires to invigorate the mind in the pursuit. Let science assume its proper character, and discharge its incumbent duties. Let it trample on the paltry distinctions with which little men make themselves known. Let it tread party and passion beneath its feet. And let its earliest, and latest acquisitions, the blossom and the fruit, be consecrated to the service of our country and the benefit of mankind.

Address before the Washington Benevolent Society

PORTSMOUTH, N. H., July 4, 1812.¹

It is in the power of every generation to make themselves, in some degree, partakers in the deeds, and in the fame of their ancestors, by adopting their principles, and studying their examples. Wherever history records the acts of men, the past has more or less influence on the present. The heart, as well as the understanding, feels the connection. There is not only a transmission of ideas and of knowledge, from generation to generation; there is also a traditional communication of sentiments and of feelings. The mind delights to associate with the spirits that have gone before it; to enter into their counsels; to embrace their designs; to feel the impulse of their motives; to enjoy their triumphs, and to hold common sorrow in their misfortunes. It exults to find itself, not a distinct, confined point of present being, without relation to the past, or the future, but a part of the great chain of existence, which commencing with the origin of our race, and running through its successive generations, binding the present to the past, and even to the future, in mutual attachments, sympathies and common desires, will hold on to the period, when all sentiments and all affections merely human shall be no more.

On the Anniversary of our national independence, we are assembled to diffuse our intellectual and moral being beyond the limits of sensible existence, and to enjoy a retrospective

¹ "Printed at the Oracle Press, by William Treadwell." This address led to Mr. Webster's being appointed a delegate from Portsmouth to the Rockingham County Convention, for which assembly he wrote the Rockingham Memorial. The Convention nominated him as a Representative to the Thirteenth Congress, to which he was subsequently elected, taking his seat, May 24, 1813.

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participation in the most important transaction in our country's history.

In an hour big with events of no ordinary import, and surrounded by dangers of no ordinary aspect, we meet, that we may ascend, together, to the original fountains of our political prosperity and happiness; that we may imbibe new portions of the spirit and the principles of our fathers, and that we may thence come, refreshed and invigorated, to whatever scenes may be before us. We come to take counsel of the dead. From the tumults and passions that agitate the living world, we withdraw to the tomb, to listen to the dictates of departed wisdom. We come, to instruct and to fortify our patriotism, by hearkening to the voice, and contemplating the character of him, to whom we owe all that nation ever can owe to mortal achievement.

Our national anniversary, and the fame of Washington are mutual guarantees for each other, that neither shall be forgotten. They are meet to be companions along the tract of our history, and to uphold, together, the name of our nation, until the extinction of the race of men. The virtues of its great leader reflect on our Revolution a character for sober wisdom, for mildness, and beneficence, which is its chief value and greatest ornament. The world saw under the guidance of Washington, what it hath seldom witnessed under other auspices, a Revolution conducted without ferocity, without fierce proscription, without blood-thirstiness; and succeeded by a government framed on the principles of rational liberty, and sincerely intended for the good of mankind.

It should be our constant aim to exhibit Washington's example as the true fruit and genuine effect of our Revolution. We should point to his principles as the true principles of our government, and to his administration as the best practical development and application of those principles. We shall thus possess an infallible criterion, by which to distinguish our countrymen from other movers of political changes, and shall be able to rescue our assumption of national rank, from the imputation of holding a common character with those commotions and outrages, those political earthquakes and thunderstorms, which have sometimes been called national revolutions.

As this occasion is particularly designed to commemorate the virtues and services of Washington, it would be a pleasant employment to attempt the delineation of his personal character. For if there was ever a man whose reputation was not accidental; whose character was systematic; and whose conduct was the result of well-considered and settled principles, that man was Washington. For him, fortune did nothing but present the occasion. His fame therefore, not resting on temporary circumstances, will not be of temporary duration. Like the spontaneous, self-planted, self-supported oak, it will continue to rear its venerable branches through many ages, and the assaults that are made upon it will but strengthen its hold, and give it deeper root in the affections of mankind.

But the circumstances of the times draw us from the personal character of our illustrious countryman, to consider those principles and maxims of civil administration by the observance of which he was so successful in maintaining the peace and fostering the commerce of the country.

Since that transaction, which gave to this day the character of an anniversary, and a jubilee, its annual return has never found us, in circumstances more critical and hazardous. This is a point not to be disputed. Whatever difference of opinion there may be, as to the causes which have produced the present situation, none deny that it is a situation both of distress and danger. We are at this moment but partially emerging from the coercion of a system of entire, severe, and universal commercial restriction. We are at [the] same time in open and public war, with the greatest maritime power on earth. This is a condition not to be trifled with. It calls for the exercise of whatever political wisdom or firmness may be found among us. It demands as well the free and dispassionate inquiry, as the unbroken resolution of the American people.

The war in which we are involved, is declared to be commenced for the defence and protection of commercial rights. It is such a war as we had no occasion to wage, during the administration of the first President. This fact, which some will ascribe to chance, others, who recollect the circumstances of those times, will think more proper to be referred to prudence and foresight.

The maxims of Washington on the subjects of commerce and foreign relations, appear to have been few, plain, and consistent. The first of these was honest and exact impartiality towards foreign nations. He deemed it the wildest of political fantasies, that nations can have friendships. In his system, therefore, every species and degree of foreign alliance was regarded as dangerous to the liberties, and destructive to the happiness of the people. When that conflict began in Europe, which has continued to the present day, and of which perhaps we shall not live to see the end, he assumed a dignified attitude of neutrality. He placed the nation above the friendship, and above the enmity of both belligerents. The tone of his measures was effectual. It produced the desired impression, and although each party in the war, in its turn inflicted manifold injuries on our commerce, the same firmness which issued the Proclamation of Neutrality, demanded satisfaction in a manner not to be disregarded.

When Washington commenced the career of his civil administration, the Constitution had been recently formed and adopted, to effect certain important objects and purposes, to which the states were incompetent in their individual capacities. With these objects and purposes he could not but be acquainted, and he sought their accomplishment with honest and ardent zeal. He drew the rules of his conduct from the spirit and design of the instrument which had been put into his hands. The national compact, he saw, guaranteed to the several states, not only equal political rights, but also equal protection to their several interests and pursuits. It was designed, not to revolutionize the habits and employment of any section of the country, but to protect the interests of all, in the channels they had naturally worn for themselves. It was an instrument of preservation, not of change. In the administration of the first President, therefore, there was nothing of constraint. Every laudable pursuit was protected, nothing was forced. None were turned from agriculture, and none were turned from commerce. The fields of earth and of ocean were alike open to cultivation and enterprise. As public happiness is nothing more than the aggregate happiness of individuals, he saw, that protected by just laws, and at liberty to pursue their

particular vocations, individuals would add to the stock of national felicity whatever they added to their own.

The Federal Constitution was adopted for no single reason so much, as for the protection of commerce. Whoever recollects, or will examine, the history of the country from the close of the war to the year 1788 will be fully sensible of this important truth. The war left the states individually sovereign and independent. They all supposed themselves able to defend themselves against external aggression, at least with the aid of such temporary alliances among themselves, as occasion might suggest. Each, too, was competent to its own domestic affairs, and the administration of its internal justice. They had all constitutions, and governments, and laws. They were in truth thirteen separate and independent nations. The confederacy which had bound them together during the war was in effect dissolved, when the war was over; for, although there remained a General Congress in name, its real powers were at an end.

In this situation, it was their commercial embarrassments and distresses, which first convinced the states of the indispensable necessity of a new general government. Without such a government, they found, that an extensive commerce, such as the local situation and natural products of the country indicated, was impracticable. There could be no system. The custom-house regulations of one state, thwarted those of another.* Instead of an united effort to rival foreign nations, petty competitions were springing up at home.

It was at the same time found impossible to negotiate commercial treaties abroad, because there was no power of compelling thirteen separate and independent governments to observe them. The first attempt to enter into commercial regulations, in Europe failed for this reason. The party to be contracted with saw no security that any stipulations which might be entered into would be performed by the states, and therefore refused to treat. We disgraced ourselves, in the eyes of Europe, by endeavoring to form commercial treaties, without the means of carrying them into effect.†

* "We have no uniformity in duties, imposts, excises, or prohibitions." Hon. Mr. Dawes' Speech in Conven. of Mass.

† "We are *one* nation to-day, and thirteen to-morrow. Who will treat

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In the meantime the debt of the revolution remained unpaid, and while it was impossible to extend our commerce under existing circumstances, it was equally impossible, without such extension of commerce, to establish a revenue adequate to any proper provision for the national debt.

Notwithstanding the urgency of these considerations, it was long before the states would consent, that a new government should be formed over them, which should deprive them of important and favorite prerogatives. "People must *feel*," said General Washington, "before they will *see* ; consequently they are brought slowly into measures of public utility."

The first project of a convention to form a general government originated with a set of commissioners from two or three states, assembled for the purpose of forming some mutual commercial regulations, and agreeing upon a common tariff for those states. As they proceeded, they saw the necessity of a convention of delegates from all the states, "to take into consideration the trade of the United States, and to consider how far a uniform system in their commercial relations may be necessary to their common interest, and their permanent harmony." They saw the inefficacy of partial and voluntary arrangements, and the utility of a great national system, which should unite all the states in one government, vested with the powers necessary for maritime defence, commercial regulation, and national revenue. These ideas are at the foundation of the national compact. They are its leading principles, and the causes of its existence.* They were primary considerations, not only with the convention which framed the Constitution, but also with the people when they adopted it. Maritime defence, commercial regulation, and revenue, were the objects,

with us on such terms?" Washington's Correspondence—vide Washington's Life, Vol. V. '73.

* If documents are wanted to prove this, see Gen. Washington's Letter to the States, June, 1783 ; Mr. Adams's Letter from Europe, July, 1783 ; The Memorial of the Merchants of Philadelphia to the Legislature of Pennsylvania, and the Resolutions thereon :—The various reports of committees, and Resolutions of Congress, calling for the investment in that body, of *new powers* ; the Resolutions of Virginia, in January, 1786. These, and innumerable other public proceedings indicate the objects and duties of the contemplated government.

and the only important objects, to which the states were confessedly incompetent, in their individual capacities. To effect these by the means of a national government, was the constant, the prevalent, the exhaustless topic of those, who favored the adoption of the Constitution. *

Commerce, therefore, comes into the view of our general government, not as a transient or incidental interest. It is not a concern, springing up, as of yesterday, with novel and unfounded pretensions. It is of the essence of the national compact ; expressed in its terms, and embodied in its consideration. It calls not only on the wisdom, but on the faith of Government. It stands on the solemn pledge of the nation.

This commerce has discharged the debt of the Revolutionary War. It has paid the price of independence. It has filled the Treasury and sustained the government from the first moments of its existence to the present time. The interests, and the habits of a vast portion of the community have become interwoven with this commerce, in a manner not to be changed, and that no government hath the *power* of changing. To call upon us now, to forsake the seas, to forget the virtues of the magnet, to lose even the observance and guidance of the stars, is to summon us to repeal at once, as well the Constitution of civilized man and the laws of nature, as the Constitution of the country.

It is not without reason, that commerce, thus the source of

* Mr. Madison himself urged the necessity of coming into the Union, as the "guardian of our commerce;" as being palpably necessary, in order "to provide and maintain a navy," and "as the only source of our maritime strength." He pressed the adoption of the Constitution especially on the inhabitants of the Atlantic frontier, as being "all of them deeply interested in the provision for naval protection."

See the 14th and 41st No.'s of the "Federalist," written by Mr. Madison.

The speeches in favor of the Constitution in the conventions of the several states are full of these sentiments. — See especially the debates in New York and Massachusetts.

In the convention of Massachusetts, where there was a majority of only nine votes in favor of the Constitution, it is very evident its final reception was owing to the exertion of the commercial interest. Instance the votes in the following counties. Suffolk, yeas 34, nays 5. Essex, yeas 38, nays 6. Worcester, yeas 7, nays 43. Berkshire, yeas 7, nays 15. See Debates in Conven. Mass. 213 *et seq.*

our wealth, the redeemer of our credit, the bond and origin of our Union, should raise its voice in loud but respectful accents, as well against those repeated restrictions which withhold it from the seas, as against premature or inexpedient war which must scourge it from them.

When the Federal Constitution committed the interest of commerce to the safe-keeping of the general government, it was not supposed to be after the manner in which a convict is committed to the safe-keeping of his jailer. It was not for close confinement. It was for encouragement, for protection and manly defence. It was to the end, that under a patronage more liberal and powerful than individual states could afford, it might explore the earth, and mix its canvas with the white clouds that hover over every sea. Its progress for many years exceeded the highest expectations of its friends. A handful of people, scattered along the coast of a great continent, just emerging from colonial subjection and the monopoly of the parent country, almost instantly, as if by miracle, presented themselves, in every corner of the globe, to which they could be water-borne. Europe saw a new competitor entering into all the great channels of the carrying trade, and some of her nations could hardly secure the monopoly of their own coastwise traffic, against the progress of this green but enterprising people. The Baltic heard unaccustomed calls for the products of its shores across the Atlantic; India perceived a new customer in her markets; and other and more active enemies than before known, were found to vex and harass the basking monsters on the shores and islands of the western seas. The benefit of this extensive traffic was felt by every interest, and every class of the community. What agriculture gave, in its products, to the deep, it received again with large and liberal increase, to fertilize its fields. The forest fell before the reflux of mercantile wealth; and population spread thick and pressed close on the retreating footsteps of savage nations.

An embargo of sixty days was the only suspension which commerce met, during the administration of Washington. It cannot be doubted that temporary embargoes may be constitutional measures, nor was there a question of the expediency of this measure of the first President. It was an act of pre-

caution. It was temporary. It had but one object, the preservation of property. There was properly "a regulation of commerce," because it regarded only the safety and protection of commerce, and was *not* adopted for the purpose of affecting other nations by withholding from them the surplus production of our soil.

It is easy to perceive that frequent resorts to "restrictions" must be productive of the worst consequences. An extensive commerce can no more endure a habit of restriction, than the human constitution can support a habit of paralytics. In either case, the first shock may be survived, but if often repeated, it is only that instead of a violent, there may come a lingering death.

Such a measure, therefore, was but once adopted, during the first twelve years of the government; although in those years the world was in uncommon agitation, and those nations especially with whom our intercourse principally was, sustained a shock, as well in their commercial as their political affairs, unprecedented in modern times. Washington viewed even a limited embargo as a measure to be justified only by the pressure of great, sudden, and unforeseen dangers. What could not be done by treaty, by wise precautions, or by present means of defence, he attempted to do, for once, by a temporary prohibition of trade. He administered "restriction" to our commerce, as its extreme medicine; not as its daily bread.

In the system of Washington was also embraced a competent provision for maritime and naval defence. He saw that we had no other grounds to look for safety or security, than in our own power to protect ourselves, and to punish wrong wherever it was offered. A navy, sufficient for the defence of our coasts and harbors, for the convoy of important branches of our trade, and sufficient also to give our enemies to understand, when they injure us, that they also are vulnerable, and that we have the power of retaliation as well as of defence, seems to be the plain, necessary, indispensable policy of the nation. It is the dictate of nature and common sense, that means of defence shall have relation to the nature of the danger.* In the ad-

* "I consider an acquisition of maritime strength essential to this country. Should we ever be so unfortunate as to be engaged in war,

ministration of Washington, whose habit it was rather to follow the course of nature, than to seek to control it, beginnings were made, bearing proportion to what our trade then was, and looking forward to what it would be. Even at that time, the quantity of our navigation justified respectable naval preparations. The quantity of shipping, owned by the single neighboring county of Essex, as early as that period, would bear comparison with the whole navigation of England in the reign of Elizabeth, when the Armada of Spain was defeated by the English navy. *

If the plan of Washington had been pursued, and our navy had been suffered to grow, as it naturally would have done, with the growth of our commerce and navigation, what a blow might at this moment be struck, and what protection yielded, surrounded as our commerce now is, with all the dangers of sudden war! Even as it is, all our immediate hopes of glory or conquest, all expectation of events that shall gratify the pride or spirit of the nation, rest on the gallantry of that little remnant of a navy, that has now gone forth, like lightning, at the beck of Government, to scour the seas.

It will not be a bright page in our history, which relates the total abandonment of all provision for naval defence, by the successors of Washington. Not to speak of policy and expediency, it will do no credit to the national faith, stipulated and plighted as it was to that object, in every way that could make the engagement solemn and obligatory. So long as our commerce remains unprotected, and our coasts and harbors undefended by naval and maritime means, essential objects of the Union remain unanswered, and the just expectation of those who assented to it, disappointed.

A part of our navy has been suffered to go to entire decay. Another part has been passed, like an article of useless lumber, under the hammer of the auctioneer. As if the millennium had already commenced, our politicians have beaten their swords

what but this can defend our towns and cities upon the sea coast, or what but this can enable us to repel an invading enemy?" Mr. Madison's speech, on the Impost and Tonnage Bill, in the first Congress.

* The State of Massachusetts has now at least four times the quantity of shipping owned by England in the reign of Elizabeth.

into ploughshares. They have actually bargained away in the market essential means of national defence, and carried the product to the Treasury. Without loss by accident, or by enemies, the second commercial nation in the world is reduced to the humiliation of being unable to assert the sovereignty of its own seas, or to protect its navigation in sight of its own shores. What war and the waves have sometimes done for others, we have done for ourselves. We have taken the destruction of our marine out of the power of fortune, and nobly achieved it by our own counsels!

But although the system of Washington embraced competent measures of defence, by sea as well as by land, yet it was his settled purpose and constant endeavor to avoid war. By able and impartial negotiations, he more than once extricated the country from the greatest embarrassments. A situation can hardly be imagined more difficult than this nation's in 1793. The war abroad was raging with uncommon violence. Our neutrality was assailed by both parties; most by that, which pretending to be engaged in a war for liberty, left no effort unessayed to draw the American people to espouse her cause. But Washington could neither be intimidated, nor deceived. He saw the path of impartiality and justice open before him. It was illuminated with all the light of heaven. It conducted to the true glory and happiness of his country. He entered, and pursued it. He triumphed, not only over the designs of foreign nations, but also over the temporary prejudices of a portion of his own countrymen.

This, gentlemen, is an imperfect view of the principal maxims of Washington's administration. Universal protection; honest, impartial negotiation; spirited preparations for defence; utter aversion to all foreign connections; the love of peace; the observance of justice; these are the pillars on which he sought to establish the national prosperity. Would to God, that the spirit of his administration might actuate the government to its latest moment; that his example might give a movement, an impulse to our political system, that should forever keep it steady and regular in its brilliant and beneficent course; like the laws of motion and of order, which pervade the orbs of the universe, impressed on them at their creation,

by the hand of their Maker, and ever afterwards remaining, inherent in their natures to regulate and to govern them.

With respect to the war, in which we are now involved, the course which our principles require us to pursue cannot be doubtful. It is now the law of the land, and as such we are bound to regard it. Resistance and insurrection form no parts of our creed. The disciples of Washington are neither tyrants *in* power, nor rebels *out*. If we are taxed, to carry on this war, we shall disregard certain distinguished examples, and shall pay. If our personal services are required, we shall yield them to the precise extent of our Constitutional liability. At the same time, the world may be assured that we know our rights, and shall exercise them. We shall express our opinions on this, as on every other measure of government, I trust without passion—I am certain without fear. We have yet to learn that the extravagant progress of pernicious measures abrogates the duty of opposition, or that the interest of our native land is to be abandoned, by us, in the hour of her thickest dangers, and sorest necessity. By the exercise of our Constitutional right of suffrage, by the peaceable remedy of election, we shall seek to restore wisdom to our councils, and peace to our country.

Standing thus pledged by our principles to obey the laws, and to perform the whole duty of faithful citizens, we are yet at liberty to declare fully and freely, the grounds on which we lament the commencement, and shall deplore the continuance of the present contest. We believe, then, that this war is not the result of impartial policy. If there be cause of war against England, there is still more abundant cause of war against France. The war is professedly undertaken, principally, on account of the continuance of the British Orders in Council. It is well known that those orders, odious as they are, did not begin the unjust and vexatious system practised upon neutrals, nor would that system end with those orders, if we should obtain the object of the war, by procuring their repeal. The Decrees of France are earlier in point of time, more extravagant in their pretensions, and ten fold more injurious in their consequences. They are aggravated by a pretended abrogation, and holding our under-

standings in no higher estimation than our rights, that nation requires us to believe in the repeal of edicts, the daily operation of which is manifest and visible before our eyes.

If it be no apology to England to have been second on the list of wrong doers, it is at least no justification to France to have been the first.

That we should now make common cause with her ; that we should unite with her to wage war against a common enemy ; that we should assist her to subdue and exterminate the nation of her adversary, and to spread chains and despotism over the civilized world ; while such accumulated wrongs on her part toward us, are unredressed, our rights set at defiance, and our national independence derided, seems to us to be a wide and dreadful departure from the course of true wisdom, and honest politics.

We believe, also, that the war is premature and inexpedient. Our shores are unprotected ; our towns exposed ; property to an immense amount in the hands of the enemy ; and the seas covered with our commerce !

It exceeds human belief, that a nation thus circumstanced, should be plunged into sudden war. With no preparations appropriate to the element where the war is to be waged ; with no means either of attack or resistance, we are to waste our spirit in empty vamping and mutual recrimination, while our most valuable rights are at the mercy of our enemies.

It is not to be concealed, that this war professedly commenced for the defence of the commercial interest, is nevertheless undertaken against the urgent and incessant remonstrances of that interest. Put the question, today, to every man embarked in commerce from here to Delaware ; will one in an hundred tell you that we are at war at his request, or for the protection of his interest ? It is not a point on which public opinion is divided by party. The magnitude of the event has in a great measure overwhelmed party distinctions. The voice of the whole mercantile interest is united, to an unprecedented degree, against the war, which is declared to be undertaken, at so much hazard of blood and treasure, for their benefit. Is this credible ? Will any man affirm his conviction, that the causes assigned for this contest, are the only causes, and that there

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has been no other motive for it, than to yield protection to those, who have assured the government, that instead of protection, it would be their ruin? *

Under these circumstances, we believe that the war, "instead of elevating will depress the national character; instead of securing, it will endanger our rights; instead of improving, it will prejudice our best interests."

Nor can we shut our eyes to the prospect of French alliance. Horrible as the contemplation of such an event is, it is forced upon us. We cannot shake it from our minds. It cannot be said, that a French connection is now more improbable, than a British war was, a year ago. The total neglect of preparation is a circumstance awfully ominous of our future course. It points but too distinctly to the arm, on which we are to rely for succor in this conflict. The same counsels, that, under the present circumstances of this country, could select England, for an enemy, must inevitably, in their further progress, cleave to France as a friend, and an ally.

French brotherhood is an idea big with horror and abomination. Up to that point, no duty of principle requires us, and no power should compel us to go. It is engraven on our hearts, and mingled with our blood, that we will have no communion or fellowship with that power. We will never consent that her unhallowed hosts shall spread over our paternal fields; that they shall violate these temples raised by the hands, and made vocal with the worship of our fathers, or that they shall profane the ground where the bones of New England's ancestors lie enshrined.

There is no common character, nor can there be a common interest, between the Protestants, the Dissenters, the Puritans of New England, and the Papists, the Infidels, the Atheists of France; or between our free, republican institutions, and the most merciless tyranny that ever Heaven suffered to afflict mankind. Let the nation be named, that is the ally of France,

* It has been sometimes said, that we commence war to "restore our character." When — how — by whom, was it lost? Certainly not by Washington. The difference between him, and his successors, is, that under Washington we had peace without disgrace — we have now disgrace without peace.

and not her slave; "let the degree of submission be marked, with which she will be content; let the line be drawn between French usurpation and national independence, which she will not pass." What people hath come within the grasp of her power, that hath not been ground to powder, or hath communed of her principles, or received the bribe of her friendship, that hath not been covered, like the mercenary servant cursed of the Prophet, with a leprosy, as white as snow?

Hath any nation or government, monarchy or republic, ventured within the den of this monster, and returned?

"Me vestigia terrent,
"Omnia te adversum spectantia, nulla retrorsum."

The fields of half Europe are whitened with the dried bones of human beings, slaughtered by this inexorable tyranny last year, and stained with the red, gushing blood of other thousands of human beings alike slain this year. From the extremity of Italy to the Baltic sea, from the Atlantic to the mouths of the Danube, can you place your foot on one inch of ground, and say you stand on the soil of a freeman? Can you, in that whole space, point me to one man whether king, prince, or peasant, that holds life or property by any other tenure than the tyrant's will? Can you show me, within the tremendous sweep of his arm, one institution of religion not profaned, or of learning not prostituted, one fountain of moral instruction not corrupted, one barrier of purity and virtue not demolished, or one principle of justice and natural right not obliterated?

If there be any among us, so infatuated, or so stupefied, as not to shudder at the prospect of French alliance, let them come and behold the nations that lie mangled and bleeding at the foot of the tyrant's throne, in a mixture of moral and political ruin. If they will not hearken to the warning voice, they may yet perhaps be shocked into some feeling by the evidence of their own senses. Let them approach, and look into the horrible pit of European suffering and calamity. Although they will not hear Moses and the Prophets, they may yet believe, when they draw near to the brink of the gulf, and with their own eyes look into the condition of the damned.

But if it be in the righteous counsel of Heaven to bury New

England, her religion, her governments, and her laws, under the throne of foreign despotism, there are those among her sons, that will never see that event. If by the vigor of their counsels, and the free exposure of their lives, they cannot avert, they will at least never endure it. They will not taste the bitterness of that cup. They will not be among the sufferers, when that vial of Heaven's wrath shall be poured out. Before that hour come, an honorable exit will be opened to them, from the land of their fathers. They cannot perish better, than standing between their country and the embraces of a ferocious tyranny, hated of man, and accursed of God. At the appointed time, they will embrace that martyrdom, not only with fortitude, but with cheerfulness; resolved, in all events, that when they shall, for the last time, behold the light of that sun, or look on the pleasant verdure of these fields, it shall not be with the eyes of slaves and subjects of an impious despotism.

The Rockingham Memorial

AUGUST, 1812.¹

MEMORIAL TO JAMES MADISON, ESQUIRE, PRESIDENT OF THE
UNITED STATES.

MORE than fifteen hundred of the inhabitants and free electors of the county of Rockingham in the state of New Hampshire, being assembled in an orderly and peaceable manner, according to our undoubted constitutional rights, at Brentwood, in said county, on the fifth day of August, 1812, to consult on the common good and public welfare, do now address you, with the respect due to the Chief Magistrate of the nation.

In assembling to express our opinions on the present state of our national affairs, we are influenced, not only by a wish to contribute, as far as in us lies, towards removing the evils which we feel, and averting the greater evils which we fear, but also by a sense of the duty we owe to the Supreme Executive of the nation.

The Chief Magistrate of a Government, which rests on public opinion, and which can only look for the support of its measures to the approbation of the people, has a right to be informed, distinctly and unequivocally, of the sentiments entertained by the community, concerning measures of great

¹ From the Portsmouth Oracle, August 8, 1812. A large assembly of citizens of Rockingham County, N. H., opposed to the War with Great Britain was held at Brentwood, August 5, 1812, and a Committee headed by Mr. Webster was appointed to prepare a Memorial to the President of the United States deprecating the War. In his Autobiography, Mr. Webster says: "August, 1812, I wrote the 'Rockingham Memorial.' It was an anti-war paper of some note in its time. I confess I am pleased to find on looking at it now, for I do not think I have read it in all the twenty years that have rolled by since I wrote it, among all its faults, whether of principle or in execution that it is of a tone and strain less vulgar than such things are prone to be."

national importance. As one portion of the community, deeply interested in the present state of things, and solicitously concerned about their future progress, we beg leave to present to you a brief view of our sentiments and opinions.

We have witnessed, with sincere and deep regret, a system of policy pursued by the General Government, from the Embargo of 1807, to the present time, tending most obviously, in our view, to the destruction of the commerce of these states. We have not been indifferent spectators of this course of measures. Being inhabitants of the Atlantic coast, we regard commerce, as a great and essential interest. It is not only in itself a leading pursuit, but it is most intimately blended with all our other interests and occupations. Habits, arising naturally from our local situation, and the nature of our soil and products, and now confirmed by the usage of two centuries, are not to be changed. We hold the right of judging for ourselves, and have never yet delegated to any government the power of deciding for us, what pursuits and occupations, best comport with our interests, and our situation. When we assented to the National Constitution, it was among other, (but none more important) reasons, to the end that our commerce might be better protected, and the farther extended. Taught to regard our right of traversing the seas, as sacred, (and it is to us as important) as our right of tilling the ground, we have supposed that we should never be deprived of the former, but for reasons, so weighty and important, as would equally justify the prohibition of the latter. We originally saw nothing, and can now see nothing, either in the letter, or the spirit, of the national compact, which makes it our duty, to acquiesce in a system, tending to compel us to abandon our natural and accustomed pursuits. We regard the Constitution as "an instrument of preservation, not of change." We take its intention to have been, to protect, by the strong arm of the whole nation, the interests of each particular section. It could not therefore be without alarm and apprehension, that we perceived in the General Government a disposition to embarrass and enthrall commerce by repeated restrictions, and to make war, by shutting up our own ports. Still greater was our concern, when we heard ourselves admonished, finally to retire

from the seas, and "to provide for ourselves, those comforts and conveniences of life, for which it would be unwise ever more to recur to distant countries." * We do not hesitate to say, that we deem this language equally unconstitutional and arrogant; and it would be with infinite regret, mingled with other strong emotions, that we should perceive a fixed and settled resolution in the General Government, to enforce this exhortation by the authority of law, and to accumulate upon us, in the intervals of war, a ponderous and crushing system of restriction, non-importation, non-intercourse, and embargo.

The alarm excited in our minds by the favorite and long continued "Restrictive System," is raised still higher, by the late declaration of war against Great Britain, an event which we believe, in the present defenceless circumstances of the country, will be productive of evils of incalculable magnitude.

We are not, sir, among those who feel an unmanly reluctance to the privations, or a nervous sensibility to the dangers of war. Many of us had the honor of aiding, by our humble efforts, in the establishment of our independence, and of exposing our lives, in more than one field of danger and blood, in our country's service. We are ready to meet those scenes again, whenever it can be shown that the vindication of our national honor, or the preservation of our essential rights, demands it. We shall not be more slow than others, to aspire after distinction, in any cause in which distinction would be honorable.

If we could perceive that the present war was just; if we could perceive that our rights and liberties required it; if we could perceive that no Administration, however wise, honest, or impartial, could have carried us clear of it; if we could perceive its expediency, and a reasonable hope of obtaining its professed objects; if we could perceive those things, the war would, in some measure, cease to be horrible. It would grow tolerable, in idea, as its expediency should be made manifest. Its iron and bloody features would soften, as its justice grew apparent. Give us but to see, that this war

* Mr. Jefferson's letter to the Legislature of New Hampshire, August, 1808.

hath clear justice, necessity, and expediency on its side, and we are ready to pour out our treasure, and our blood in its prosecution.

But we are constrained to say, that we cannot, in conscience, ascribe the foregoing characteristics, to the present war. We are not, sir, the apologists of other nations, nor will our voice ever be heard, to varnish wrongs, inflicted either on the interest or honor of our native land. But we deem it necessary, to every justifiable war, not only that its justice be as plain and visible as the light of Heaven, but that its objects be distinct and clear, in order that every man may see them; that they be great, in order that every man perceive their importance; that they be probably attainable, in order that every citizen may be encouraged to contend for them. We are wholly mistaken, if the causes assigned for the present war against England will bear the test of these principles.

The impressment of our seamen, which forms the most plausible and popular of the alleged causes of war, we believe to have been the subject of great misrepresentation. We have as much sympathy as others, for those who suffer under this abuse of power. We know there are instances of this abuse. We know that native American citizens have been, in some cases, in too many cases, impressed from American merchant ships, and compelled to serve on board British ships of war. But the number of these cases has been extravagantly exaggerated. Every inquiry on the subject strengthens our conviction, that the reputed number bears little relation to the true number. We are among those, to whom instances of impressment, if they did actually exist to any considerable extent, must be known. Yet we cannot find them out. Some of the members of this meeting have been constantly employed in commercial pursuits, and have had ships on the ocean from the Peace of 1783, until the ocean became unnavigable, as to us, by the Embargo of 1807, and yet during all that time have never suffered the loss of one native American seaman, by impressment. Other members of this meeting have, as masters of vessels, long inhabited, as it were, on the seas, and have been visited hundreds of times by British ships of war, and never had an American seaman taken from them by impressment.

The people of the neighboring Commonwealth, as we understand, have been as unable as ourselves, to discover instances of impressment, in any degree equal to the alleged numbers. It is impossible, under these circumstances, for us to believe, that the evil of impressment does exist, in the degree of enormity pretended. If so many of our seafaring fellow-citizens were actually in bondage, they must have been taken from among the inhabitants of the Atlantic coast. They would be from among our brethren, sons, relations and friends. We should be acquainted with them, and their misfortunes. We should hear the cries of their wives and children, their parents and relatives, quite as soon as our fellow-citizens of the South and the West.

It is well worthy of notice, that the greatest apparent feeling on this subject of impressments, and the greatest disposition to wage war on that account, are entertained by the representatives of those states, which have no seamen at all of their own; while those sections of the community, in which more than three-fourths of the mariners of the United States have their homes, are, by great majorities, against that war, among the professed objects of which, the release of impressed seamen forms so principal a figure.

It is well known that England pretends to no right of impressing our seamen. She insists, only, that she has a right to the service of her own subjects, in time of war, even though found serving on board the merchant ships of other nations. This claim we suppose to be neither unfounded, nor novel. It is recognized by the public law of Europe, and of the civilized world. Writers of the highest authority maintain, that the right belongs to all nations. For the same reason, say they, that the father of a family may demand the aid of his children to defend himself and his house, a nation may call home her subjects to her defence and protection, in time of war.

But if this were not so, is our nation to plunge into a ruinous war, in order to settle a question of relative right, between the government of a foreign nation and the subjects of that government? Are we to fight the battles of British seamen? Nay more — are we to espouse their cause, in opposition to the cause of our own native mariners? Shall we contend for the

free and privileged admission of foreigners into our merchant service, and thereby exclude the seamen of New England from that service? Do we profess to be at war, for the support of our seamen's rights, when we contend for a point, which, if gained, will shut them out from the most lucrative part of their employment, and "sacrifice their interest, that British and other foreign seamen may have equal privileges with themselves?"

Fatal, indeed, would it be to important interests of the navigating states, if the consequence of this war should be that the American flag shall give the American character to all who sail under it, and thus invite thousands of foreign seamen to enter into our service, and thrust aside our own native citizens.

But this evil of impressment, however great it may be, is at least not greater now, than it was in the time of Washington. That great man did not, however, deem it an evil to be remedied by war. Neither did it occur to President Adams, nor even to President Jefferson, that it would be wise or politic, for the purpose of attempting to rescue a very small portion of our seamen from captivity, to commence a war, which must inevitably, as this war will, consign ten times as many to a captivity as bad.

England has always professed a willingness to adjust this subject by amicable arrangement. She has repeatedly called on us to do our part, towards effecting such adjustment. She has reminded us of the facility — we may say the falsity, with which American protections are obtained; of the frequent instances, in which Irishmen and others, that cannot speak a word of our language, are found with American protections in their pockets. She has, expressly, and officially, offered to prohibit, by severe laws, all impressments from American vessels, if the American Government would enact laws prohibiting American officers from granting protections, of certificates of citizenship to British subjects. She has also, through her Ministers, offered to restore every native seaman, that our Government could name, as being under impressment. For years preceding the Declaration of War, our Government has been, in a manner, silent on this subject. Under an expectation (which has never been broken off) of an amicable arrange-

ment, Government seems to have ceased to make it a topic of complaint. When the arrangement was made with Mr. Erskine, the present Administration themselves did not consider any existing difficulties on the subject of impressment as insuperable obstacles to peace.

What is it, then, that hath since given to this subject a sudden and unusual importance? What is it, that hath so completely stifled the voice of the friends of the seamen, and at the same time called into action such powerful sympathies in the bosom of strangers? What is it, that hath raised the voice, beyond the western mountains, so loud and clamorous for their protection by war, while the fathers and brethren, the friends and relatives, the wives and children of these very seamen — nay even the seamen themselves, deprecate this war, as the greatest calamity that could fall upon them?

The blockade, and Orders in Council, the other causes of war, bear no better examination than the subject of impressment. The blockade, now so grievous to be endured, we know was regarded, at the time it was laid, as a measure favorable to our interests. We know this, upon the express declaration of Mr. Monroe, then our Minister in England. We have his own words, that it should be regarded “in a favorable light,” and that it “promised to be highly satisfactory to our commercial interests.”

By what train of reasoning this favor is now turned into an injury, and an injury of such magnitude as to justify war, we are utterly at a loss to comprehend.

We are equally unsatisfied with the arguments used, to prove that the Decrees of France were repealed in November, 1810, and that therefore, without departing from impartial policy, we are justified in undertaking to compel England, by war, to abandon her Orders in Council. Against such supposed repeal of the French Decrees we have the express declaration of the French Government itself, as late as March, 1812, alleging that those decrees did then exist. We have also, had daily evidence of their operation, in the destruction of our property, and some members of this meeting have convictions of the existence and operation of those decrees, down to the very moment of our declaration of war; which convictions,

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being produced by great and repeated personal losses, in the seizures, detentions, confiscations, and burnings, under those very decrees, are not likely to be removed, by any ingenious comments on the terms of an ambiguous, deceptive, and fallacious instrument, like the Duke of Cadore's letter.

But this question is now at rest. The recent appearance of the French Decree, purporting to be dated April 28, 1811, leaves no foothold for persistence and partiality longer to stand upon. That decree declares, that in consequence of measures adopted by our Government against England in March, 1811, the Decrees of Berlin and Milan shall now be considered as having ceased to operate, as against us, in November, 1810. This proves beyond contradiction, that those decrees were not repealed, at the time when our government adopted measures against England, founded on their supposed repeal.

A more singular incongruity, than is here manifest, never characterized the intercourse of nations. In March, 1811, this Government took measures against England, because France had actually repealed her decrees. Afterwards, in May, 1811, France repealed her decrees, because our government had actually taken measures against England.

The conduct of France, in relation to the repeal of her edicts, exhibits, to our view a scene of the most contemptible fraud and juggling that ever disgraced the court of any nation.

The British Orders in Council, we are informed, are now revoked. We cannot but lament, that the declaration of war was forced and hurried, as if to put us beyond the benefit of favorable events. Every attempt at postponement was ineffectual, and the question was taken, at a moment, when, perhaps, a month's delay would have removed the principal ground of complaint, and averted the awful calamity.

As none of the complaints against England are of recent origin ; as they must all have been long in the contemplation of Government, it was reasonably expected, that if Government intended war, it would have made adequate provision and preparation for that event. In this expectation we have been disappointed. The nation is totally unprepared for war. We

say totally unprepared; because the degree of preparation bears no definable relation to the magnitude of the occasion, or to the greatness of the interests which are at stake.

Without mentioning the situation of our inland frontier, it is sufficient to advert to the exposed state of our sea coast, and commerce. It is unheard of, and beyond imagination strange, in our opinion, that such great and important interests as the navigation and commerce of a whole country, should be put to hazard, — nay to certain loss — for want of that protection, which is in the power, and which we presume to say it was the duty, of Government, to have afforded.

On the subject of naval defence, we do not feel ourselves confined to the mere language of supplication. On that topic we do not address ourselves to the favor and clemency only, of any Administration. We hold it to be our right, to demand, at the hand of the General Government, adequate protection to our lawful commerce. When the Constitution empowered the Government to build and maintain a navy, it was not supposed, that that provision would remain inoperative parchment, and a dead letter. On the contrary, it was confidently expected that that power would be exercised, as cheerfully as the power to levy and collect taxes. We consider protection on the sea to be as solemnly guaranteed to us by the Constitution, as protection on the land; and we shall as readily assent, to a practical construction of that instrument, which deprives us of the one, as to that which deprives us of the other.

When the commercial and navigating states surrendered to the General Government the riches of their custom-houses, and thereby parted with the fairest portion of their revenue, leaving to themselves nothing to defray the expenses of their own establishments, but an unpleasant resort to direct taxation, they had a right to expect, and they did expect, from the wisdom and justice of that Government, adequate and ample means of protection and defence. They entered into the union under this full expectation. It was an expectation, raised and excited, not only by the express words of the Constitution itself, but also by the declarations and assurances of those, who recommended its adoption.

It is not disrespectful to remind you sir, that a distinguished

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advocate* for the union of these states, urged the adoption of the Federal Constitution upon the inhabitants of the Atlantic frontier in the following manner :

“ The palpable necessity of the power to provide and maintain a navy, has protected that part of the Constitution, against a spirit of censure which has spared few other parts. It must be numbered among the greatest blessings of America, that as her union will be the only source of her maritime strength, so this will be the principal source of her security against danger from abroad.

“ The inhabitants of the Atlantic frontier are all of them deeply interested, in this provision for naval protection, and if they have hitherto been suffered to sleep quietly in their beds, if their property has remained safe against the predatory spirit of licentious adventurers ; if their maritime towns have not yet been compelled to ransom themselves from the terrors of conflagration, by yielding to the exactions of daring and sudden invaders, these instances of good fortune are not to be ascribed to the capacities of the existing Government (in 1788.)”

The same distinguished gentleman, at a later period, gave to the people of this nation a solemn and official pledge of his sentiments on this important subject, in his station as a leading member of Congress, in the following emphatic manner.

“ I consider an acquisition of maritime strength essential, to this country ; should we ever be so unfortunate as to be engaged in war, what but this can defend our towns and cities upon the sea coast ? or what but this can enable us to repel an invading enemy.” †

May we now, sir, be permitted to ask, whether these hopes have been realized, and these assurances performed ? Has this solemn pledge been redeemed ? Does the present actual administration of the Constitution comport with these principles ? Is a sufficient navy provided and maintained ? Is this naval protection in which the inhabitants of the Atlantic frontier are so deeply interested, afforded to them ? Can they, now, sleep quietly in their beds ? Is their property now safe against the licentious spirit of predatory adventurers ? Are their maritime

* Mr. Madison himself.

† Mr. Madison's Speech in Congress, 1789.

towns secure from the terrors of conflagration, or the exactions of daring and sudden invaders? We put these questions, not merely to the wisdom and policy, but to the duty and the conscience of our Government. Alas! it is notorious that we have not this navy; we are not protected; we cannot be quiet, or secure; our maritime towns are not safe against invasion and burning; our best interests are at the mercy of our enemies, and we can do nothing, but sit still, and see the fruits of thirty years of laborious industry swept away with the besom of destruction!

We are, sir, from principle and habit attached to the union of the states. But our attachment is to the substance, and not to the form. It is to the good which this union is capable of producing, and not to the evil, which is suffered unnaturally to grow out of it. If the time should ever arrive, when this union shall be holden together by nothing but the authority of law; when its incorporating, vital principle shall become extinct; when its principal exercises shall consist in acts of power and authority, not of protection and beneficence; when it shall lose the strong bond which it hath hitherto had in the public affection; and when, consequently, we shall be one, not in interest and mutual regard, but in name and form only; we, sir, shall look on that hour, as the closing scene of our country's prosperity.

We shrink from the separation of the states, as an event fraught with incalculable evils, and it is among our strongest objections to the present course of measures, that they have, in our opinion, a very dangerous and alarming bearing on such an event. If a separation of the states ever should take place, it will be, on some occasion, when one portion of the country undertakes to control, to regulate, and to sacrifice the interest of another; when a small and heated majority in the Government, taking counsel of their passions, and not of their reason, contemptuously disregarding the interests, and perhaps stopping the mouths, of a large and respectable minority, shall by hasty, rash, and ruinous measures, threaten to destroy essential rights; and lay waste the most important interests.

It shall be our most fervent supplication to Heaven to avert both the event and the occasion; and the Government may be

assured, that the tie that binds us to the Union, will never be broken, by us.

But although we lament the present war, on all accounts, yet do we deprecate it, most of all, as we view in it, as we fear, the harbinger of French Alliance. Our apprehensions, on this head, are not unnatural. The United States, and Napoleon, emperor and king, have a common enemy, and, in some sort, a common cause. They wage war against England, for objects, in some degree, the same. There has been, really or apparently, a series of remarkable coincidences in the measures of the two Governments. Add to this the known character of the French court for intrigue, circumvention, and perfidy, and the world will judge, whether our fears are either groundless, or unwarrantable.

On the subject, of any French connection, either close, or the more remote, we have made up our minds. We will, in no event, assist in uniting the Republic of America with the military despotism of France. We will have no connection with her principles, or her power. If her armed troops, under whatever name or character, should come here, we shall regard them as enemies. No pressure, domestic or foreign, shall ever compel us to connect our interests with those of the house of Corsica; or to yoke ourselves, to the triumphal car of the conqueror and the tyrant of continental Europe. In forming this resolution, we have not been thoughtless of possible consequences. We have weighed them. We have reflected on the measures, which an adherence to this resolution might hereafter occasion. We have considered the events which may grow out of it. In the full and undisguised view of these consequences, we have formed this our resolution, and we affirm to you, sir, and to the world, that it is deep, fixed, and unchangeable.

It only remains for us, to express our conscientious convictions, that the present course of measures will prove most prejudicial and ruinous to the country, and to supplicate the government to adopt such a system as shall restore to us the blessings of peace and of commerce.

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